SUPREME COURT, U. S.

JUL 15 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 292

UNITED MINE WORKERS OF AMERICA, DISTRICT 30, UNITED MINE WORKERS OF AMERICA, C. E. BEANE, JOSEPH CASTLE, JOSEPH DAVIS and NOBLE HOBBS,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

EDWARD L. CAREY
HARRISON COMBS
WILLARD OWENS
900 Fifteenth Street, N.W.
Washington, D. C.

H. B. NOBLE
304 Main Street
Hazard, Kentucky

M. E. BOIARSKY
511 Kanawha Valley Building
Charleston, West Virginia

Counsel for Petitioners

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

INDEX

TABLE OF CONTENTS

	Page
OPINIONS BELOW	3
JURISDICTION	3
QUESTIONS PRESENTED	3
STATUTORY PROVISIONS AND RULES INVOLVED	4
STATEMENT OF THE CASE	5
A. The Sixth Circuit's Rule to Show Cause	5
1. Unions' Motion to Discharge and Vacate Show Cause Order Is Denied	5
B. Petitioners' Answer to Board's Contempt Petition	7
C. Petitioners Renew Defenses; The Sixth Circuit Appoints a Special Master	8
D. The Parties Disagree on the Standard of Proof Required to Find Petitioners Guilty of Civil Contempt	9
E. The Facts	9
1. 1960 Decree	9
2. The Charging Parties	10
3. The Petitioners	10
4. The Facts Concerning the Alleged Unfair Labor Practices and the Alleged Contemptuous Conduct	12
Incidents at the Mahan Tipple	12

Page

Picketing at Lick Branch 18

The Incident Along U. S. Route 23 19

Picketing at Sun Valley 20

The Pure Oil Station Incident 20

F. The Special Master's Hearing and His Findings of Fact and Conclusions of Law 21

G. In Affirming the Master's Findings With Modifications, the Sixth Circuit Adopted a Standard of Proof at Variance with the Requirements of Norris-LaGuardia's Section 6, As Well As the Standard Recommended by the Master 22

REASONS FOR GRANTING THE WRIT 23

I. The Sixth Circuit's Opinion and Judgment that Findings of Fact Supported by Substantial Evidence on the Record Considered as a Whole Is the Proper Standard of Proof in a Civil Contempt Proceeding Instituted by NLRB Against a Labor Union and Others in a Labor Dispute Conflict with an Eighth Circuit Decision, They Collide with Express Language of the Act, and They Are in Conflict with This Court's Prior Important Decisions Which Hold That Norris-LaGuardia's Section 6 Represents the Proper Standard for Determining Responsibility 23

II. The Sixth Circuit's Opinion and Judgment and Its Order Denying Unions' Discharge Motion Are in Conflict with Its Own Prior Opinion, with Those of the First and Ninth Circuits, and with the Rationale of a Prior Important

Page

Decision of This Court. They Both Accord and Conflict with the Second Circuit's Views. This Court Should Settle the Conflict 30

III. The Sixth Circuit's Rejection of Mootness Conflicts with Doctrinaire Which Has Been Well Settled in Important Decisions of This Court and It Is at Variance with Decisions of the District of Columbia Circuit 35

IV. Sanctions Imposed by the Sixth Circuit's Opinion and Judgment Do Not Accord with This Court's Prior Decisions in Civil Contempt Cases. The Opinion and Judgment Erroneously Expand the Enforcement Order 38

CONCLUSION 41

Page

TABLE OF CASES

A. H. Bull Steamship Co. v. *Seafarer's International Union, etc.*, 250 F.2d 326, 330, cert. den. 355 U.S. 932 30

Anderson v. *Dunn*, 6 Wheat., 204, 231, 5 L.ed 242 36

Brotherhood of Carpenters v. *U. S.*, 330 U.S. 395, 401 27

Communications Workers v. *NLRB*, 362 U.S. 479 40

Gompers v. *Buck's Stove & Range Co.*, 221 U.S. 418, 441, 446, 451 ..... 25, 36, 37, 38, 39

Green v. *U. S.*, 356 U.S. 165 (1958) 26

Kansas City Power & Light Co. v. *NLRB*, 8 Cir., 137 F.2d 77, 79 ..... 9, 24, 25

McCrone v. *U. S.*, 307 U.S. 61, 64 38

Milk Wagon Drivers' Union v. *Meadowmoor Dairies*, 312 U.S. 287, 298 33

Morrison-Knudsen, Inc. v. *NLRB*, 9 Cir., 270 F.2d 864, 865 35

NLRB v. *Deena Artware, Inc.*, 6 Cir., 261 F.2d 503 ... 26

NLRB v. *District 30, UMW, et al.*, 6 Cir., No. 18,383 38

NLRB v. *Express Publishing Co.*, 312 U.S. 426, 435 ..... 35, 40

NLRB v. *Local 926*, 5 Cir., 267 F.2d 418, 421 40

NLRB v. *Local 5881, UMWA*, 6 Cir., 323 F.2d 853 (1963) 27, 34

NLRB v. *M. Lowenstein & Sons, Inc.*, 2 Cir., 121 F.2d 673, 675 34

Page

NLRB v. *New York Merchandise Co., Inc.*, 134 F.2d 949, 953 34

NLRB v. *Ochoa Fertilizer Corp.*, 368 U.S. 318 7

NLRB v. *Pacific Greyhound Lines*, 9 Cir., 106 F.2d 867 (1939) 33, 34

NLRB v. *Reed & Prince Mfg. Co.*, 1 Cir., 196 F.2d 755, 759, 760 ..... 33, 35, 39

NLRB v. *Standard Trouser Co.*, 4 Cir., 162 F.2d 1012 (1947) 26

NLRB v. *UMW, et al.*, 6 Cir., 393 F.2d 265 3

Nelson v. *Steiner*, 7 Cir., 279 F.2d 944 (1960) 26, 38

Penfield Co. v. *Securities and Exchange Commission*, 330 U.S. 585, 590, 593 ..... 37, 38, 39

Tosh v. *West Kentucky Coal Co.*, 6 Cir., 252 F. 44, 49, 50, 51 (1918) 32, 33

UMW v. *Gibbs*, 383 U.S. 715, 736, 737, 738, 739 ..... 26, 28

U. S. v. *Galante*, 2 Cir., 298 F.2d 72 (1962) 26

U. S. v. United Mine Workers of America, D.C. Cir., 190 F.2d 865, 873 (1951) 36, 37, 38

STATUTES AND RULES

18 USCA 401 4

Labor Management Relations Act, 1947:

Section 2(13) [29 USCA 152 (13)] 4, 28

Section 7 [29 USCA 157] 21, 23

Section 8(b)(1)(A) [29 USCA 158(b)(1)(A)] 4, 6, 7, 22, 34

Page

Section 8(b)(7) [29 USCA 158(b)(7)] 7, 34, 38

Section 10 [29 USCA 160] 25, 26

Section 10(e) [29 USCA 160(e)] 4, 24

Section 10(f) [29 USCA 160(f)] 4, 24

Section 10(h) [29 USCA 160(h)] 4, 25

Section 187 [29 USCA 303] 28

Norris-LaGuardia Act:

Section 6 [29 USCA 106] 3, 4, 21, 22, 23, 24, 25, 26, 27, 28, 29, 40

Federal Rules of Civil Procedure:

Rule 52(a) 5

Rule 53(e)(2) 5

Rule 65(d) 5, 21

INDEX TO APPENDIX IN PETITION

APPENDIX A—Report of Special Master 1a

APPENDIX B—Opinion of the Sixth Circuit 23a

APPENDIX C—Final Judgment 30a

APPENDIX D—Decree of the United States Court of Appeals for the Sixth Circuit, Dated May 20, 1960 ..... 35a

APPENDIX E—Orders of the Sixth Circuit 36a

APPENDIX F—Statutes 47a

18 USCA 401 ..... 47a

Labor Management Relations Act, 1947 [29 USCA] 47a

Page

Section 6 [29 USCA 106] 47a

Section 8(b)(1)(A) [29 USCA 158(b)(1)(A)] 47a

Section 8(b)(7) [29 USCA 158 (b)(7)] 48a

Section 10(e) [29 USCA 160(e)] 48a

Section 10(f) [29 USCA 160(f)] 49a

Section 10(h) [29 USCA 160 (h)] 50a

Federal Rules of Civil Procedure 50a

Rule 52 (a) 50a

Rule 53(e)(2) 51a

Rule 65(d) 51a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. --------

UNITED MINE WORKERS OF AMERICA, DISTRICT 30, UNITED MINE WORKERS OF AMERICA, C. E. BEANE, JOSEPH CASTLE, JOSEPH DAVIS and NOBLE HOBBS,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, United Mine Workers of America, District 30, United Mine Workers of America, C. E. Beane, Joseph Castle, Joseph Davis, Noble Hobbs,[1] and each of them, pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit entered April 18, 1968 in Case No.

[1]Petitioners herein are referred to as follows: United Mine Workers of America as "UMW"; District 30, United Mine Workers of America as "District 30"; C. E. Beane as "Beane"; Joseph Castle as "Castle"; Joseph Davis as "Davis" and Noble Hobbs as "Hoobs". Unless otherwise indicated, all emphases herein are supplied.

Pagination references following the Symbol "R." are to the certified record filed in this Court's Clerk's office; "T." to the transcript of proceedings *before the Special Master; and "A." to the Appendix to this* Petition.

14,228, styled *National Labor Relations Board, Petitioner* v. *United Mine Workers of America and District 30, United Mine Workers of America, Respondents,* being "On Petition of the National Labor Relations Board for Adjudication in Civil Contempt", and wherein the Sixth Circuit affirmed, as modified and corrected, the findings of fact of its Special Master (United States District Judge Charles W. Neese) dated December 5, 1967, ordering Petitioners, and each of them, be held in civil contempt, that they purge themselves thereof by ceasing specified coercive conduct as to employees of Terry Elkhorn Mining Company, Inc., W. C. Mahan, d/b/a Mahan Coal Company and Harry Wright Construction Company, Inc.,[2] or of any other employer within District 30's territorial jurisdiction, and not violating in any other manner the Sixth Circuit's May 20, 1960 decree, and by posting notices and filing evidence of compliance, that they jointly and severally pay NLRB its court costs,[3] and further ordering that upon failure of the two Unions, or either of them, to purge themselves, "this Court hereby imposes a compliance fine of $25,000 and a further compliance fine of $1,000 per day on each of said respondents so long as such non-compliance continues" and in the event that either of the individual Petitioners violates the May 20, 1960 decree or the decree of April 18, 1968 "in the future, that each pay a fine of $5,000 or be confined to jail for a period of 30 days for each such violation", the foregoing fines and penalties to be "imposed only in the event" Petitioners fail, following entry of the decree, "to purge themselves of contempt" as directed therein. Future violations would be dealt with by such means as the Sixth Circuit deems appropriate, including

[2]Called "Terry Elkhorn", "Mahan" and "Wright", respectively.

[3]This amount to be fixed by the Sixth Circuit's further order after service and submission by NLRB of a statement of costs.

issuance of a body attachment against those responsible for noncompliance (A. 30-34a).

A certified copy of the transcript of the record in said case, including the proceedings in the Sixth Circuit, is furnished herewith in accordance with this Court's Rules.

OPINIONS BELOW

The Report of the Special Master, filed December 5, 1967, appears in Appendix A hereto (pp. 1a-22a) and in the certified record (R. 33).

The Sixth Circuit's opinion of April 18, 1968 appears in Appendix A hereto (pp. 23-29a) and in the certified record (R. 37). It is reported *sub nom. NLRB* v. *UMW et al.*, 6 Cir., 393 F.2d 265.

JURISDICTION

The Sixth Circuit's judgment was entered April 18, 1968 (A. 30-34a). This Court's jurisdiction is invoked under 28 USCA 1254(1) and 2101(c).

QUESTIONS PRESENTED

1. Where a court of appeals' decree enjoined, pursuant to an NLRB cease and desist order, designated labor unions, their officers and agents, from coercing employees, and thereafter the Board seeks a civil contempt adjudication upon charges that the enjoined union through its agents have contemned the enforcement decree, did the court of appeals commit error in finding the alleged contemnors guilty on the ground that findings of fact by a Special Master are supported by substantial evidence on the record considered as a whole, and in failing to apply the standards of proof accorded to labor unions, their officers and others, in Section 6 of the Norris-LaGuardia Act (29 USCA 106)?

2. Does such enforcement decree enjoining coercive

picketing as to employees "of any employer engaged" in operations within the geographical limits of one of the union's territorial jurisdiction apply to (a) the operations of employers who admittedly were not in business when the enforcement decree was entered in 1960, (b) to an employer who was not a complaining party in the proceedings which occasioned the enforcement decree, and (c) to situations where there is no relationship between activities upon which the Board bases its charges of civil contempt and those which formed the basis of the court of appeals' enforcement decree in 1960?

3. Where the National Labor Relations Board seeks an adjudication of civil contempt against labor unions and their agents, based upon charges of coercive picketing, and a previous court of appeals' decree enjoined such picketing, is it error for the court of appeals to reject a defense of mootness and find the alleged contemnors to be guilty of civil contempt when the evidence affirmatively shows all picketing ceased prior to the Board's filing the civil contempt petition?

4. Under applicable law, did the evidence suffice to warrant the finding that Petitioners, and each of them, had contemned the Sixth Circuit's decree of May 20, 1960?

5. Is the Sixth Circuit's order of April 18, 1968 supported by applicable principles of law and evidence?

STATUTORY PROVISIONS AND RULES INVOLVED

Section 6 of the Norris-LaGuardia Act (29 USCA 106) and sections 2(13), 8(b)(1)(A) and 10(e), (f) and (h) of the Labor Management Relations Act, 1947, herein called "Act" [29 USCA 152(13), 158(b)(1)(A) and 160 (e), (f) and (h)] are involved, as is Title 18, USCA, Section 401.

Likewise involved are Rules 53(e)(2), 52(a) and 65(d), Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

A. THE SIXTH CIRCUIT'S RULE TO SHOW CAUSE

1. Unions' Motion to Discharge and Vacate Show Cause Order Is Denied.

On *May 20, 1960,* the Sixth Circuit entered a consent decree directing UMW and District 30, their officers, agents, successors and assigns, not to restrain and coerce employees of any employer engaged in coal mining operations or in processing, transporting and/or distributing coal within the geographical limits of District 30's territorial jurisdiction in the exercise of rights guaranteed them by the Act's Section 7.

Thereafter, on July 8, 1966, NLRB filed a Petition for Adjudication in Civil Contempt and for Other Civil Relief, alleging the two Unions, their officers and agents, particularly C. E. Beane, member of UMW's Executive Board and District 30's President, and Field Representatives Joseph Castle, Joseph Davis, Noble Hobbs and others should be held in civil contempt for violating, disobeying and failing and refusing to comply with the Court's decree of May 20, 1960 in connection with operations of Terry Elkhorn, Mahan and Wright (R. 4).

Responsive to the Sixth Circuit's order of July 8, 1966 that Petitioners specifically admit or deny, or meet by affirmative defense, each allegation of NLRB's petition, Petitioners, by motion to discharge and vacate the show cause order and dismiss NLRB's contempt petition, denied the accusation and asserted the petition's insufficiency in failing to show that the acts and conduct of which NLRB complained to the Court had any relation-

ship to activities and circumstances forming the bases of the Sixth Circuit's May 20, 1960 decree, and avowing, in fact, such activities refer to a new and independent set of circumstances, not in any wise related to the conduct which caused the Sixth Circuit to enter its May 20, 1960 decree and that, upon information and belief, neither Terry Elkhorn Coal Co., Inc. nor Harry Wright Construction Company conducted existing operations on May 20, 1960, and while M. C. Mahan then conducted an operation, it was a partnership operation and not one conducted as Mahan Coal Company.[4]

Additionally, Union's motion to discharge, etc. asserted that on July 8, 1960, NLRB's Regional Director, Ninth Region, advised Unions, by letter, of their compliance with the Board's order with which the May 20, 1960 decree was concerned and that NLRB's files "are hereby closed, and will be continued as closed cases so long as the present status of compliance continues" (R. 6); and Petitioners' charge that "no change in that status has occurred" stands unchallenged.

Thirdly, the same motion charged that NLRB sought, contrary to law, to have the Sixth Circuit act as a labor court in the first instance by virtue of its contempt powers, and supported their charge by exhibits (R. 6) showing that unfair labor practice charges were filed with NLRB on behalf of Terry, Mahan and Wright complaining that Unions were guilty of violating the Act's Section 8 (b) (1) (A)

---

[4]These allegations in Petitioners' motion to discharge and vacate, supported by affidavit of Harrison Combs (R. 6), one of Petitioners' counsel, stand undisputed in the record. For contents of the Combs affidavit, see post, p. 30.

Subsequently, in the hearing before the Special Master, it was Stipulated (R. 30-V, Stipulation B) that neither Terry Elkhorn, Mahan, nor Wright "were charging parties" in the NLRB "proceedings which resulted in the" Sixth Circuit's "May 20, 1960 decree." For the period when these parties engaged in business, see post, p. 10.

[employee coercion] and Section 8(b)(7) [organizational and recognitional picketing]; and while an NLRB complaint issued to process the 8(b)(7) charge, no NLRB complaint issued to determine whether Petitioners violated 8(b)(1)(A), but instead, NLRB sought to have that question determined by instituting the instant contempt proceedings, although both violations involved a single circumstance of picketing; and NLRB did not deny it could have consolidated with the cases involving the alleged organizational and recognitional picketing the alleged coercive conduct matter involved in this proceeding.

The Sixth Circuit rejected Union's motion on October 7, 1966 (A. 36-37a), holding the contempt petition "alleges conduct" on Petitioners' part "which, if true, was proscribed by the Board's order" and noting that this Court upheld a similar order in *NLRB* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318, which does no more than sanction a broad NLRB order because no objection thereto had been urged before that Board.

B. PETITIONERS' ANSWER TO BOARD'S CONTEMPT PETITION.

Petitioners severally admitted the Sixth Circuit's enforcement of the NLRB order, but denied the allegation of having violated, disobeyed and failed and refused to comply with the May, 1960 decree (R. 9, 10). Petitioners severally conceded that each had notice and actual knowledge of its terms.[5] Answers filed by unions (R. 9, 10), admitting C. E. Beane's presidency of District 30 and his membership on UMW's Executive

---

[5]Newberry's answer contained his denial, while Akers' denial came in an amendment to his original answer, permitted by the Master (T. 667). The Sixth Circuit did not hold either of them in contempt. (A. 26-27a).

Board, denied his having acted in concert and participation with other officers, agents, and members in the violations described in the contempt petition and the further allegation that "by reason thereof" Beane "is subject to the decree herein and responsible and liable for the United Mine Workers of America's and District 30's disobedience thereof and their failure to comply therewith." Both Unions allege that neither of them actually or otherwise participated in, or actually or otherwise authorized, the individual Petitioners or any other agent to engage in activities described in the contempt petition or that either ratified any act violative of the May 20, 1960 decree after actual or other knowledge thereof, although District 30 admitted that Petitioners Castle, Davis, Akers and Hobbs were its field representatives but denied they were agents of either UMW or District 30 in concert and participation with them in disobeying the 1960 decree as charged. Both Unions admitted J. D. Newberry's membership in Local Union No. 7788, an autonomous local union, but each denied his agency.

C. PETITIONERS RENEW DEFENSES; THE SIXTH CIRCUIT APPOINTS A SPECIAL MASTER.

Defenses asserted by Unions in motions above discussed were reiterated in Petitioners' answers, as well as in their respective Renewals of their discharge motions (R. 11). NLRB sought to have the Sixth Circuit strike these defenses from Petitioners' respective answers; NLRB opposed such renewal and sought the Sixth Circuit's appointment of a Special Master to consider and report upon issues in the contempt proceedings; in a January 3, 1967 order (R. 12, 14, 15), the Sixth Circuit appointed Honorable Charles G. Neese, District Judge, to hear evidence relative to the issues of fact raised by

the Board's petition "and as denied by" Petitioners in accordance with Federal Rules of Civil Procedure (R. 18), reserving action on NLRB's motion to strike portions of answers aforesaid and "All other matters", pending the Special Master's filing of his report (A. 37a, 46a).

D. THE PARTIES DISAGREE ON THE STANDARD OF PROOF REQUIRED TO FIND PETITIONERS GUILTY OF CIVIL CONTEMPT.

In Proposed Findings of Fact and Conclusions of Law (R. 29, pp. 24 *et seq.*), Petitioners pressed upon the Special Master that whether the Sixth Circuit's 1960 decree had been contemned was to be determined by standards found in Norris-LaGuardia's Section 6 (29 USCA 106). NLRB argued that since the contempt proceeding was civil, its burden was met by "clear and convincing evidence" which *Kansas City Power & Light Co.* v. *NLRB*, 8 Cir., 137 F.2d 77, 79, defined as "something more than a bare preponderance of evidence"; and it urged responsibility was to be determined by the common law rules of agency under the Act's Section 2(13) [29 USCA 152 (13)][6]

E. THE FACTS

1. 1960 Decree

A consent decree, entered by the Sixth Circuit on May 20, 1960, enforced an NLRB order which directed Union Petitioners not to "restrain and coerce employees . . of any . . employer engaged in coal mining operations or in processing, transporting and/or distributing coal within the geographical limits of the territorial jurisdiction of District 30, United Mine Workers of America . . by engaging in and/or participating in conduct more fully described below:

---

[6]These and other statutory provisions, as well as pertinent Rules of Civil Procedure, appear in Appendix F, pp. 47-51a.

"(a) Exerting force or committing acts of force and violence against said employees, injuring the person or damaging the property of said employees, threatening said employees by following them in superior numbers, using or threatening to use force or violence against said employees, assaulting employees, attempting to assault employees, threatening them with reprisals, barring their ingress to or egress from their places of employment, preventing them physically from working or in any manner restraining or coercing them in the exercise of said rights" (A. 35a).

2. The Charging Parties

Terry Elkhorn, *incorporated March 2, 1964,* mined coal by strip and auger methods at two locations in Floyd County, Kentucky, which was hauled by Wright, an independent contractor, operating a fleet of trucks under contract with Terry Elkhorn, although Wright drove one of the trucks (T. 151-52). One of the tipples to which Wright hauled the coal had been constructed by Mahan who began its operation in October, 1964 (T. 208; A. 2-3a), although Mahan testified he had been in coal business since 1959 (T. 207).

Neither Terry Elkhorn nor its principal stockholder, nor Mahan, nor Wright was a charging party in any of the NLRB proceedings which resulted in the Sixth Circuit's decree entered May 20, 1960 (see Stipulation B filed with the Special Master, R 30-V).

These operations were within the geographical limits of District 30's territorial jurisdiction.

3. The Petitioners

District 30 is a non-autonomous, provisional district, established in accordance with Article III, Section 2,

[7]See Stipulation D, filed with the Special Master (R. 30-V).

Constitution of the International Union.[7] It has no constitution or by-laws of its own and is governed in accordance with the International Constitution.

All collective bargaining agreements entered into with employers on behalf of union members are negotiated and executed by the International Union at the direction of its Policy Committee. Neither District 30, nor any local union within its jurisdiction, has the power to enter into such agreements.

District 30's officers are appointed by the International President for unspecified terms and are directly accountable to the international. Their salaries and expenses are fixed and paid directly by the International and they receive no financial benefits out of District 30's funds. No District 30 officer or agent is appointed or elected by a membership vote.[8]

The International President appointed Petitioner Beane as President of District 30. Petitioners Hobbs, Castle, Davis and Akers were Field Representatives of District 30. Though a member of a local union, Akers was not employed by UMW or by District 30, but by coal companies, until he became a District 30 Field Representative in 1965.

With the exception of Akers, the officers and field representatives were employed by District 30 in 1960, and had notice of the Sixth Circuit's 1960 decree. Akers, not employed by District 30 until 1965, had no knowledge of events leading to the Sixth Circuit's decree (T. 653-55). Newberry had no knowledge of such events (T. 496-97), though admitted he recalled the trouble in 1959 regarding the contract dispute (T. 517-18).

---

[8]See Stipulation D, filed with the Special Master (R. 30-V).

4. The Facts Concerning the Alleged Unfair Labor Practices and the Alleged Contemptuous Conduct

Almost all coal mines in Floyd County, Kentucky, were under UMW contract. Several months prior to March 31, 1966, Field Representative Hobbs first became aware that Terry Elkhorn was unorganized when some of Mahan's and Terry Elkhorn's employees asked local union members for membership cards, and executed and returned them to the local union (T. 472-73). Because several members asked that something be done, on March 31, Hobbs and Castle met 10 or 12 men, among them a UMW pensioner and another not identified, and Terry Elkhorn employees, and later drove to the Mahan tipple (T. 559, 560, 573). Other incidents occurred at the Lick Branch mine, at the Sun Valley tipple, at the Pure Oil station and along U.S. Route 23.

Incidents at the Mahan Tipple

Hobbs parked his car in front of Patton's Store; Castle drove his car behind the store. Their arrival found 30 to 40 men already picketing (T. 561, 565, 620), as well as Kentucky state police who, like Castle, had parked their cars behind Patton's Store.[9] Terry Elkhorn's President Hovatter, arriving near the tipple, claimed two cars blocked the roadway, one of which was Castle's. Asking them to move the cars, Hovatter claims Castle made no effort to do so, so he asked Mahan to get the license numbers and swear out a warrant for their arrest (T. 126-29). When Mahan sought the license numbers Castle had already moved his car at state police request (T. 571-72, 603, 606). Though Mahan claimed when he tried to write

[9]Witnesses estimated 35 to 40 men present, consisting of employees from other mines living in the area, former mine employees on pension from UMWA Welfare and Retirement Fund, as well as sight-seers (T. 559-65, 615-19). Mahan's estimate of 100-150 pickets (T. 210) is countered by Hovatter's estimate of 60 (T. 127).

down the license number, Castle tried unsuccessfully to grab the paper from him (T. 127, 211), Castle avowed that when Mahan asked whose car it was, Castle admitted ownership (T. 618). Hovatter and Mahan then left the area to obtain Castle's arrest.[10]

Both Hobbs and Castle (T. 619) claimed that upon arrival at the tipple coal was being run (T. 561); no trucks were parked; when one truck was flagged and the driver, stopping his truck, talked to some pickets and signed a union card, other drivers then parked behind him, several of whom signed union membership cards (T. 566-67, 600). This caused the trucks to begin stacking up and operations were shut down for a while (T. 600-01).

Upon Mahan's return to the tipple, the pickets were gone and his employees refused to continue working that day (T. 212). Mahan operated the tipple himself, unloaded nine trucks and quit for the day (T. 212).

Leaving the tipple about 10:00 a.m., Hobbs went to the Terry Elkhorn strip pit, parking his car at the bottom of the hill. Some 12 or 15 men, including two or three Terry Elkhorn employees, walked to the strip pit where a UMW pensioner (John Marshall) advised the foreman they were interested in getting the men to join UMW, and asked and received permission for him to talk to the men (T. 573-75). The foreman shut down the job and the men asked employees to sign a card, which three of them did, while one said he was afraid because he "didn't know what was going to happen", but then signed a card. Some employees indicated disinterest (T. 573-75).

Hobbs was at the Mahan tipple for a short time on April 2, but did not think the tipple was operating. The

[10]Mahan claimed nothing was done concerning the warrants because "the Trial Judge told me that the trial could come up May 15th, and they had the trial April 15th" (T. 229-30).

Mahan tipple did not operate on Sunday, April 3, but reopened on April 4. Again, a large number of men assembled in the area between Patton's Store and the tipple, and these included Castle, Hobbs, Davis and Akers (T. 218, 539, 576, 607). According to Mahan, Akers and Davis asked him why he wasn't a good fellow and to go ahead and sign a union contract, which was refused (T. 218). Castle sought to have a state police go with him to see if he could talk to Mahan; the state police refused. According to Castle when, on this occasion, he advised Mahan that three or four employees had signed cards and asked Mahan to sign a contract, Mahan refused (T. 540-42). In a conversation with Hobbs on this occasion (April 4), Mahan told Hobbs he did not want them to organize his mine, which brought Hobbs' reply that was his job and they were going to try to organize peacefully and lawfully (T. 576-77). Mahan also charged when he went to drop a railroad car down to the loading point pickets prevented a tipple employee from doing so (T. 218); Hobbs stepped between two railroad cars, preventing Mahan from uncoupling the cars; he and Hobbs pushed each other; and when pickets closed in on Mahan and one grabbed a pinch bar from him, Hobbs instructed him to give it back (T. 218-19).

An employee testified that Hobbs asked him to join the union and sign a union card (T. 389), and Wright (a charging party) related that Hobbs and Newberry asked him to join the union, pull his trucks off, but he refused (T. 155). Davis admitted asking Wright to sign a card and asking him to get the truck drivers together for a meeting (T. 538). Wright attributed to Akers the statement that "This will be Union coal dumped here if you work any more" (T. 156), but Akers' version of the incident shows that he asked Wright to sign a union card

and told him if coal was dumped there he "hoped" it would be union coal (T. 650-51). Though nails were scattered around the tipple area, there is no evidence as to who put them there. Hobbs and Akers denied knowledge of how the nails got scattered around (T. 580, 658-59); both picked the nails up and asked "some of the boys" to help pick them up (T. 547-48, 580, 651-52).

Mahan admitted offering to stop operating the tipple until after a Floyd County Circuit Court injunction hearing the following day; after talking "to the Union men", in five or ten minutes he came back with an acquiescence (T. 220). Between 10:30 a.m. and 1:00 p.m., the tipple ceased operating and was closed down for the remainder of the day (T. 577, 579).

The mines and tipple did not operate on April 5—the day for the Floyd County Circuit Court injunction hearing (T. 219-20).

Mahan estimated on April 6, 400-500 men were at the tipple (T. 222). Wright charged Akers told him he did not want to see him hurt but would like him to park his truck (T. 156), and that as he pulled away from Akers someone in the crowd called out that he had better park it, threatening to burn both his truck and trailer and to "beat you down beside of them" (T. 156-57). Akers' version is that he told Wright he could pay a decent wage, that Wright offered to sign a union card "if you will pay for my truck", to which Akers replied he could not do that (T. 650).

The tipple did not work on April 5 and 6, and only for a short time on April 7. Mahan testified his men told him they were frightened and, after operating three or four days, they refused to work (T. 222-24).

District 30's President Beane was in Washington, D. C. with regard to contract negotiations beginning March 30 and had no knowledge of any picketing until about April 4 or 5 (T. 523-26). A number of miners in District 30 had gone on strike when their employers had not executed a successor contract to the one which expired April 1, 1966 (T. 530). By April 7 or 8, UMW had negotiated a contract with Peabody Coal Co. but had been unable to reach an agreement with operators in District 30. (T. 525-26). Returning from Washington, on April 9 Beane held a meeting of local union officers to explain the Peabody agreement's terms and advised them, as well as field representatives, to do what they could to get the employees to return to work pending further negotiations with operators in District 30 and to cease all picketing, including Terry Elkhorn's operations (T. 339-41). To get a larger crowd another meeting was arranged for, at which Beane again on April 11 advised the members to return to work but they were not successful until sometime later in the month (T. 337-46, 524-33). Some striking miners were among those participating in picketing of Mahan and Terry Elkhorn. No district representative appeared at the tipple or at Terry Elkhorn's operations after District 30's President Beane on April 9 and 11 advised roving pickets and others *to discontinue all picketing* (A. 9a).

The tipple resumed operations the latter part of April or early May (T. 222-23).

Following a three-week shut down, Mahan sought to operate his tipple again early in May (T. 222-23). Pickets —though *not any field representative*—were present. On one occasion, Mrs. Mahan testified to an incident when, going with her husband to the tipple, approximately 100

people yelled at the watchman. When an *unidentified* individual made an improper remark, Newberry admonished him not to make such remarks; and Mrs. Mahan credited Newberry with the statement that the tipple would not operate the next day, adding, "I will guarantee that." Whereupon, one Hayden, *not otherwise identified,* claimed to have the kerosene, while another *unidentified* individual claimed to have the match, and still another *unidentified* person declared, "if that doesn't work, I have the dynamite" (T. 249-51). She also attributed to an *unidentified* person the statement, "Mahan, before I die, I am going to kill you" (T. 251). Newberry denied the remarks Mrs. Mahan attributed to him (T. 479-81).

On May 17 *women* and *children* blocked coal trucks so as to impede them from getting to the tipple; *school children* let air out of Mahan's watchman's tires and surrounded the car when he attempted to leave (T. 224-25); and state police led the watchman's car through the women and children, and on that occasion Mahan saw a *union member* who had frequently been on the picket line (T. 225). A state police observed that "the school kids blocked the roads, blocked the coal trucks, and the parents were there, present with them, helping them to do it" (T. 109).

According to Terry Elkhorn's president, pickets were at the tipple up to May 17, the last day the tipple operated (T. 133).

There was testimony also that a watchman was shot at and someone threw rocks and fire crackers from the bushes (T. 274-78), and the latter part of May several holes were burned in the ramp (T. 265) and a week later a crusher was destroyed by an explosive (T. 265,

268). No witness identified the person or persons responsible for these activities.

Picketing at Lick Branch

Picketing which started at Lick Branch on March 31 ceased, as the Master's narrative states (A. 13a), "After a visit to the picket line at Lick Branch by Mr. Hobbs, all those assembled, except one picket, departed the scene behind the Hobbs vehicle" and "A Kentucky state policeman was then advised by a picket that the picketing would be halted" (A. 13-14a). On several occasions field representatives and Newberry stopped to talk to pickets as they drove by (T. 379, 445, 446, 610).

About April 6 a retired coal miner, by agreement with Terry Elkhorn employees, prepared a sign reading "UMW of A pickets" (T. 337), which was displayed at Lick Branch. Petitioners had nothing to do with its preparation or display (T. 444). Pickets were employees of other coal companies in the area, of Terry Elkhorn and Mahan, as well as pensioners. On several occasions these pickets threw rocks at trucks (T. 351-52, 371-73). Wright charged that, on April 8, Castle threw a rock at Wright's truck and other pickets joined in the rock throwing (T. 154, 168); but Castle denied the charge, and while a large number of state police were present, they did not testify to such an incident or any report of it. The lack of verification by state police or other independent witnesses beclouds Wright's charge. When Wright claimed he was assaulted on April 19, he failed to identify his assailants (T. 168-69).

There was evidence of rock throwing incidents on April 8, 11 and 19 (T. 56, 99, 351-52, 371) and other acts of violence (T. 414), name calling (T. 57, 107-08, 352, 390), and pickets were accused of throwing nails in front of trucks (T. 90-91, 107, 390-91,

394, 398) causing several flat tires (T. 399), but there is also testimony that one of Terry Elkhorn's drivers threw tacks under a truck on one occasion (T. 391).

On April 20 Newberry paid cash to a radio station to announce a meeting of "UMW, District 30" near Prestonsburg, Kentucky.[11] While there is evidence that more than 500 pickets were at Lick Branch, Newberry admitted the announcement was made but testified that no meeting was held because "there wasn't but one or two there of the boys showed up," and the meeting was called off (T. 496).

Despite such evidence, other than the April 8 incident when Wright accused Castle of rock throwing, all other evidence fails to identify any picket who committed any wrongful act or to show that pickets' presence on the picket line was at the request of either of Petitioners.

The Incident Along U. S. Route 23

A company employee related after April 4 he led truck convoys from the mine to the tipples in groups of 5 to 20 trucks (T. 414); on one occasion a car passed and a driver, identified only as Theodore Warrix, Jr., held up a gun for him to see. There was also testimony of activities by *unidentified* persons who tried to wreck the trucks (T. 418), as well as evidence that one car containing six *unidentified* men passed a truck, and one of whom—also *unidentified*—pointed a rifle out of the car window (T. 373), while another witness related an *unidentified* person waived a dynamite stick out of the car window as it passed the truck (T. 379-80).

---

[11]See Stipulation A filed with the Special Master (R. 30-V).

Picketing at Sun Valley

Terry Elkhorn's tipple foreman related that Joe Castle, together with 100 pickets, came to the operation on April 4, and credited Castle with the statement that "I just couldn't work any more, or wouldn't" (T. 312), and related that Newberry stated "We would like to have you join us" (T. 313). The group remained there for about one-half hour. According to the tipple foreman, when Castle told him that he could empty the bin "if I would shut down", the witness related, "this I wouldn't agree to" (T. 314).

Terry Elkhorn's secretary related that on April 9 Castle came to the Sun Valley tipple with 70 to 100 pickets who remained for an hour or more talking to employees (T. 295-98). On April 20, she related, seeing a white car going up the highway from the tipple and saw flames over the coal hopper (T. 299).

The Pure Oil Station Incident

An incident admitted in evidence related to a truck driver whose tire picked up a nail and went flat as his truck passed pickets at Lick Branch, causing him to go to a Pure Oil station for repairs. On the same occasion, Newberry came to the station with bad brakes on his car (T. 284). A group of *unidentified* persons asked the truck driver what his trouble was and, stating it was a flat tire, one of the *unidentified* men told him to dump the coal in his truck and the *unidentified* persons then tripped the truck's tailgate (T. 189); one threw a sledge hammer into the windshield while others grabbed and assaulted him (T. 189, 193-94). A person identified as George Vaughan was identified as the man who assaulted him (T. 191-92).

F. THE SPECIAL MASTER'S HEARING AND HIS FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The Special Master took testimony on June 1, 2, 5 and 6, 1967.

Although NLRB introduced no evidence that either UMW or District 30 actually authorized, or participated in, any conduct prohibited by the 1960 decree, or ratified such conduct after actual knowledge thereof, the Master recommended to the Sixth Circuit that Petitioners be found guilty of civil contempt, finding they "clearly, unequivocally and convincingly participated, or were interested in" the labor dispute and as UMW agents, "committed, or constructively ratified, unlawful acts within the meaning of" Norris-LaGuardia's Section 6; that UMW, through the individual Petitioners and Akers and Newberry, violated the 1960 decree within the Sixth Circuit's jurisdiction by acts of violence upon employees of Elkhorn, Wright and Mahan, inflicting damage to the employers' properties, barring ingress to and egress from the employees' places of employment and other acts, and "by restraining and coercing such employees" in the exercise of rights guaranteed by 29 USCA 157—all prior to July 8, 1966, when the contempt petition was filed (A. 14-15a). Further, though acknowledging that Rule 65, Federal Rules of Civil Procedure, specifically required *actual notice* of an injunction order, but to hold UMW responsible for conduct of Newberry and Akers, he first imputed to them UMW's knowledge because it "neglected to communicate" such knowledge to them and then imputed liability to the Union for their alleged contemptuous conduct (A. 17-18a).

In conclusions of law recommended by the Master, UMW and District 30 were held to comprise the same

legal entity; and expressing the belief that "Only ordinary evidence was required to establish the authority" of individuals to act as UMW agents "in performing their respective specific acts", the Master concluded that UMW "was *vicariously responsible*" for acts of Beane and the field representatives (A. 18a, 19a).

The Special Master rationalized that because Beane was officially responsible for conducting UMW's affairs in District 30 and because he was apprised of the writ directed to UMW and District 30 but "failed to take appropriate action within his power to inspire the performance of the union's duty thereunder", Beane, as well as "the union itself", is guilty of disobedience. (A. 21a).

The Master concluded that the various acts of misconduct attributed to the individual Petitioners, other than Beane, violated the 1960 decree, as well as 29 USCA 158(b)(1)(A), and that such individuals "instigated unlawful conduct on the part of other persons, and each is liable for the actions of those whom he induced to act unlawfully", declaring "A person is chargeable for the 'foreseeable consequences of his conduct' " (A. 21a).

G. IN AFFIRMING THE MASTER'S FINDINGS WITH MODIFICATIONS, THE SIXTH CIRCUIT ADOPTED A STANDARD OF PROOF AT VARIANCE WITH THE REQUIREMENTS OF NORRIS-LaGUARDIA'S SECTION 6, AS WELL AS THE STANDARD RECOMMENDED BY THE MASTER.

Upon submission of the Special Master's report to the Sixth Circuit, as well as NLRB's corrections and objections thereto (R. 34) and UMW's objections thereto (R. 35), together with supporting briefs, the Sixth Circuit, upon "the entire record" concluded that the Master's findings "should be modified and corrected in the particulars set forth in the proposed corrections filed by" NLRB and that said findings of fact, as modified and

corrected, should be approved and confirmed in all respects (A. 26a). Whereas the Master concluded that proof against the "aforenamed agents" of UMW "of the aforementioned violations met the requisite modicum of establishment by clear and convincing evidence" (A. 16a), the Sixth Circuit held that "said findings of fact are supported by substantial evidence on the record considered as a whole." Its decision or opinion contained a copy of an order dated April 18, 1968, in which it adjudged in civil contempt each of Petitioners (A. 26-29a, 30-34a), and ordered that they purge themselves thereof by ceasing and desisting from restraining and coercing employees of the three complaining employers "or of any other employers engaged in coal mining operations . . within" District 30's geographical limits in the exercise of their Section 7 rights by specific conduct or "in any other manner restraining or coercing said employees in the exercise of said rights" and "Violating in any other manner this Court's decree of May 20, 1960; provided, however, that this order shall not be construed as prohibiting lawful and peaceful picketing." Other portions of the order, already discussed (*ante*, p. 1-3), appear at pages 28-29a of Appendix B herein.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S OPINION AND JUDGMENT THAT FINDINGS OF FACT SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD CONSIDERED AS A WHOLE IS THE PROPER STANDARD OF PROOF IN A CIVIL CONTEMPT PROCEEDING INSTITUTED BY NLRB AGAINST A LABOR UNION AND OTHERS IN A LABOR DISPUTE CONFLICT WITH AN EIGHTH CIRCUIT DECISION, THEY COLLIDE WITH EXPRESS LANGUAGE OF THE ACT, AND THEY ARE IN CONFLICT WITH THIS COURT'S PRIOR IMPORTANT DECISIONS WHICH HOLD THAT NORRIS-LaGUARDIA'S SECTION 6 REPRESENTS THE PROPER STANDARD FOR DETERMINING RESPONSIBILITY.

The Sixth Circuit's holding that "findings of fact . . supported by substantial evidence on the record considered as a whole" is the proper quantum for standard of proof for

finding a labor union and its agents guilty of civil contempt in a proceeding instituted by NLRB collides with the Eighth Circuit's holding in *Kansas City Power & Light Co.* v. *NLRB*, 8 Cir., 137 F.2d 77, 79, stating, "The rule as to the quantum of evidence in civil contempt proceedings is in no way affected by the situation that such proceeding is in connection with an enforcement decree of an order of the Board." Though the Sixth Circuit's Opinion does not so recite, it is evident it has employed the standard found in the Act's Section 10(e) and (f) which accords a conclusive factor to NLRB findings "if supported by substantial evidence on the record considered as a whole" in enforcing, modifying, and enforcing as so modified an order of NLRB. Even where the contempt proceeding does not involve a labor union, *Kansas City Power* required that the contempt be proved by clear and convincing evidence rather than a "bare preponderance."

In the Sixth Circuit, NLRB argued that since the contempt proceeding arose under the Act, Norris-LaGuardia's Section 6 does not apply; and with this conclusion the Sixth Circuit apparently agreed. However, the Act's language nullifies NLRB's contention and the Sixth Circuit's holding. The fact that Section 10(e) and (f) empowers courts of appeals to enforce NLRB orders and conjoins with such power a conclusiveness where NLRB findings are "supported by substantial evidence on the record considered as a whole" emphasizes Congress' clear intent to limit court of appeals' enforcement to situations which involve the problem of whether NLRB findings were so supported. It stresses the lack of Congressional intent and purpose, as well as language, to include enforcement of an NLRB order which has been translated into a court of appeals' order.

While Congress made clear that Norris-LaGuardia's Section 6 was inapplicable where appellate courts dealt with relief sought by NLRB under Section 10 (29 USCA 160), the Act's language discloses firmly that Section 6's inapplicability was limited to those instances delineated in Section 10 (29 USCA 160). Section 10(h) [29 USCA 160(h)] reads:

> "When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, *as provided in this section*, the jurisdiction of courts sitting in equity shall not be limited by sections 101-115 of this title."

Thus, it is manifest that Congress' pattern of rendering inapplicable the provisions of Norris-LaGuardia's Section 6 was limited, as Section 10(h) reads to the power granted courts of appeal "as provided in this section".

While admittedly *Gompers* v. *Buck's Stove and R. Co.*, 221 U.S. 418, 446, regards a proceeding in civil contempt as part of the original proceeding in the court of appeals, it does not follow therefrom that the substantive standard of conduct is measured by the statute dealing with unfair labor practices. Concurrence with this proposition came in *Kansas City Power & Light Co.* (137 F.2d 79).

Indeed, contempt proceedings do not derive from the Act itself but from courts' inherent power. Notably, it is not NLRB's order which is being enforced in a civil contempt action but that of the court of appeals—in the instant case, the Sixth Circuit. NLRB's authority to seek enforcement of its order and the Sixth Circuit's power to enforce became *functus officio* under the statute

when the Sixth Circuit entered its May 20, 1960 decree. Historically, this Court and other federal courts have fashioned rules pertaining to alleged contempts on a basis unrelated to legal principles involved in litigation leading to an order which allegedly has been contemned. Indeed, this Court and other federal courts[12] have cautioned federal courts to use the extraordinary power of contempt with the utmost sense of responsibility and circumspection. Thus, it becomes crucial for the Court to recall that in the instant contempt proceeding's inception, Union Petitioners sought unsuccessfully to have the Sixth Circuit reject jurisdiction on the ground that NLRB was already processing a companion case to that which it submitted to the Sixth Circuit in the contempt proceeding. Thus, had the Board processed the companion case, Section 10 would have been applicable. Over Union objections NLRB persisted in the contempt proceeding; it thereby waived its right to have adjudication under the Act and it thereby placed itself in a posture where Norris-LaGuardia's Section 6 applied.

Indeed, *UMW* v. *Gibbs,* 383 U.S. 715, 736, recognizes that the legislative history indicates that Congress did not repeal Section 6 outright "but left it applicable to cases not arising under the new Act." As already noted the instant contempt proceeding is not one which arises "under the new Act."

The Sixth Circuit declared in *NLRB* v. *Deena Artware, Inc.,* 6 Cir., 261 F.2d 503, the inherent power to punish for contempt may be limited by Congress, and Congress did so limit that power in its enactment of 18 USCA 401. Congress also placed another limitation

[12] *Green* v. *U. S.,* 356 U.S. 165 (1958); *U. S.* v. *Galante,* 2 Cir., 298 F.2d 72 (1962); *NLRB* v. *Standard Trouser Co.,* 4 Cir., 162 F.2d 1012 (1947); *Nelson* v. *Steiner,* 7 Cir., 279 F.2d 944 (1960).

upon the courts' inherent power to punish for contempt by providing that in labor disputes the standard of proof, both as to labor unions and to individuals, officers and members charged with contempt, shall be, as Norris-LaGuardia's Section 6 mandatorily dictates, only upon "clear proof of *actual participation in, or actual authorization of*", illegal acts of individual officers, members or agents, or "of ratification of such acts *after actual knowledge thereof.*"

One of the basic purposes of Section 6 was to insulate labor unions against responsibility for the unlawful conduct of their members, agents, employees and officers. It contemplated that actual, not theoretical, culpability or complicity could provide a basis for responsibility. Repetitive use of the word "actual" in the congressional enactment under consideration undeniably evidences the intent of Congress that responsibility for unlawful acts should rest upon factual realities and not juristic imputations.

Brotherhood of Carpenters v. *U.S.*, 330 U.S. 395, 401, emphasizes Section 6's applicability in holding its provisions binding upon *all* courts of the United States and

> ". . . *its purpose and effect was to relieve organizations, whether of labor or capital, and members of those organizations from liability for damages or imputation of guilt for lawless acts done in labor disputes by some individual officers or members of the organization, without clear proof that the organization or member charged with responsibility for the offense actually participated, gave prior authorization, or ratified such acts after actual knowledge of their perpetration.*"[13]

[13]Of cases cited by NLRB (Main Brief, p. 24) to support its position, only *NLRB* v. *Local 5881, UMWA*, 6 Cir., 323 F.2d 853 (1963) involved a labor union but no question concerning Norris-LaGuardia's Section 6's applicability was raised in that case.

The Sixth Circuit's error is made manifest by this Court's rationale for Section 6 as expressed in *Gibbs* (383 U.S. 736-37) on the issue of liability:

> "The driving force behind § 6 and the opposition to § 303, even in its limited form, was the fear that unions might be destroyed if they could be held liable for damage done by acts beyond their practical control."

Petitioners do not, as NLRB stated to the Sixth Circuit (Main Br. 57) employ *Gibbs* for the proposition that Section 6 sets the standard "for proving agency" and it is likewise evident NLRB misreads *Gibbs* in its statement that *Gibbs* specifically noted that to determine agency the Act's Section 2(13) [29 USCA 152(13)] controls. To the contrary, *Gibbs* is cited by Petitioners as authority that a union's and an individual respondent's responsibility and liability are to be measured by Section 6's standards. Thus, if Section 6 were implemented, the Union Petitioners could not be held responsible since NLRB offered *no evidence* of actual participation in or actual authorization of the unlawful conduct, or ratification thereof after actual knowledge thereof.

Examination of the Master's factual narrative (A. 2-14a) shows that Beane, on April 9 and again on April 11, 1966[14] held a meeting with some pickets and on each occasion advised those assembled "to discontinue all picketing" (A. 9a). Yet in findings approved by the Sixth Circuit it found that the Union Petitioners, as well as Beane and the field representatives, "clearly, unequivocally and convincingly participated, or were interested, in the aforementioned labor dispute, and as

---

[14]Unless otherwise indicated, all dates herein refer to the year 1966.

agents" of UMW "committed, or constructively ratified, unlawful acts within" Norris-LaGuardia's Section 6 (A. 15a). As for Beane, the Master concluded that the Sixth Circuit's 1960 decree was a command to Beane, who was officially responsible for the conduct of the affairs of "UMW in its District 30"; that he was apprised of the writ "and failed to take appropriate action within his power to inspire the performance of the union's duty thereunder" and that "he, no less than the union itself, is guilty of disobedience" (A. 21a). Thus, it is obvious the Sixth Circuit's holding imputes to one agent alleged illegal conduct of another agent, even though Beane had no knowledge of alleged illegal conduct. It must be recalled that the issue here was whether Beane had contemned the May, 1960 decree. The picketing itself was not violative of that decree. No evidence supports that Beane ever knew that any acts were considered illegal by NLRB until after the instant proceeding was filed. Beane's liability is clearly erroneous when measured by Section 6's standards. The Sixth Circuit's holding and judgment herein that the Union Petitioners, as well as Beane, contemned its order are in conflict with the foregoing discussion.

Since the other individual Petitioners were held to have contemned the 1960 decree because, as the Master stated, they "instigated unlawful conduct on the part of other persons, and each is liable for the actions of those whom he induced to act unlawfully", (A. 21a) and as UMW agents "committed or constructively ratified, unlawful acts" (A. 15a), it is obvious that the Sixth Circuit did not apply Section 6's provisions for determining their responsibility.

Judicial authority admonishes that "repeals by implication are not favored", especially where the Norris-La-

Guardia Act is not a forgotten one, but is a significant piece of legislation which Congress had specifically in mind when it enacted the Act (*A. H. Bull Steamship Co.* v. *Seafarers' International Union, etc.*, 2 Cir., 250 F.2d 326, 330, cert. den. 355 U.S. 932).

II. THE SIXTH CIRCUIT'S OPINION AND JUDGMENT AND ITS ORDER DENYING UNIONS' DISCHARGE MOTION ARE IN CONFLICT WITH ITS OWN PRIOR OPINION, WITH THOSE OF THE FIRST AND NINTH CIRCUITS, AND WITH THE RATIONALE OF A PRIOR IMPORTANT DECISION OF THIS COURT. THEY BOTH ACCORD AND CONFLICT WITH THE SECOND CIRCUIT'S VIEWS. THIS COURT SHOULD SETTLE THE CONFLICT.

One of the issues reserved by the Sixth Circuit in its order of October 6, 1966 and its order of reference of January 3, 1967 (see Appendix E., A. 46a) pertained to the court's jurisdiction and the contempt petition's sufficiency on the ground that the acts of which NLRB complained therein had no relationship to activities and circumstances forming the bases of the Sixth Circuit's 1960 decree and that such activities referred to a new and independent set of circumstances not in anywise related to the conduct which occasioned the Sixth Circuit's entry of its 1960 decree.

The Harrison Combs affidavit, supportive of the motion to discharge, states (See R. 6, Exhibit I, p. 2):

> "I have participated in numerous cases which involved the same alleged activities with which the Board's Complaints were concerned and know that such alleged activities related primarily to picketing which arose due to the refusal by coal operators mining coal in the Commonwealth of Kentucky to sign the National Bituminous Coal Wage Agreement of 1950, as amended effective September 1, 1958, because of the inclusion therein of the 'Protective Wage Clause'. Said 1950 Agreement was again amended effective April 2, 1964 and, as so amended,

did not carry forward said 'Protective Wage Clause'.

and

> "The various alleged acts of which the Board now complains as set forth in said Petition are in no wise related to or connected with the dispute between Respondent Unions and operators in said Board cases nor are they based upon or due to the Protective Wage Clause . ."

Its recitals were not denied.

The record establishes that Terry Elkhorn did not begin its business until after *March 2, 1964* and that its principal stockholder, Charles Hovatter, was not doing business in Kentucky prior to June, 1960, (T. 121; see Stipulation B filed with the Special Master); that since 1959 Mahan has engaged in coal mining operations under the name of Mahan Coal Company (T. 207, 227-28) and in October, 1964, entered into an agreement with Terry Elkhorn to construct and operate a tipple at Auxier, Kentucky, exclusively for Terry Elkhorn coal; that since February 15, 1966, Wright has been engaged by Terry Elkhorn to transport coal by truck from its mines to points of processing (T. 151, 245); and that neither Terry Elkhorn, Hovatter, Mahan, nor Wright was a charging party in NLRB proceedings which resulted in the 1960 decree (see Stipulation B filed by the Special Master).

The Sixth Circuit did not act upon the matters reserved by it, but permitted its previous orders to stand, and entered its order holding Petitioners in contempt. Thus, in so doing, the Sixth Circuit's opinion and judgment and its order denying Unions' discharge motion are in conflict with the Sixth Circuit's own prior opinion, with those of the First and Ninth Circuits, and with the rationale of a prior important decision of this Court. However, cases in the Second Circuit both accord and

conflict with the Sixth Circuit's holding herein. Petitioners submit that this Court should settle the conflict because of the obvious importance to organizations involved in labor disputes, whether labor or management.

Though NLRB's petition correctly alleges the Sixth Circuit entered its decree enforcing in full a Board order, both allegations and proof failed to show any relationship between the dispute and activities of which NLRB now complains and upon which it premised its civil contempt charge and those which formed the basis of the Sixth Circuit's 1960 enforcement order.

That such a connection is a *sine qua non* to a civil contempt charge and finding was the Sixth Circuit's holding in *Tosh* v. *West Kentucky Coal Co.*, 6 Cir., 252 F. 44 (1918). *Tosh* involved a charge that a district court's injunction entered in 1907 had been contemned by activities occurring in 1917; but the Sixth Circuit declared (252 F. 49):

> "We find nothing in either allegations or proofs indicating that the strike *of 1907*, or the interference with the business of complainant which formed the basis of the injunction, had continued subsequent to the decree made in that year, *or that the conditions existing in 1917 were anything more than a new and independent effort to unionize the mines.*"

Emphasizing the need for tying current activities into the basis or reason for an injunction order, the Sixth Circuit cogently recited that (252 F. 50):

> "If the injunction of 1907 is of its own force applicable to *new conditions* in 1917, no reason appears why it would not be applicable to conditions 20 years, or even 30 years, after the decree is entered . ."

and, continuing (252 F. 51):

> "Under such circumstances the recognition of the power of summary prosecution for contempt, without previous adjudication that the existing conditions are such as to justify injunction . . is fraught with great possibilities for oppression."

Applicable to the instant situation is *Tosh's* further remark (252 F. 50):

> " . . the renewed efforts of the United Mine Workers to unionize the mines . . were not enough to so tie the conditions of *1917* to those existing in *1907* as . . *to make the former but an extension of the strike of 1907* . ."

The enunciation in *Milk Wagon Drivers' Union* v. *Meadowmoor Dairies,* 312 U.S. 287, 298, that

> "The injunction which we sustain is *'permanent' only for the temporary period* for which it may last. *It is justified only by the violence that induced it and only so long as it counteracts a continuing intimidation"*

accords with *Tosh's* rationale, but is contrary to the Sixth Circuit's action herein.

Reiteration of the *Tosh* doctrine came in *NLRB* v *Reed & Prince Mfg. Co.,* 1 Cir., 196 F.2d 755, 760, where the First Circuit *refused* a petition for adjudication in civil contempt and observed the alleged contumacy *"involves a new and independent set of circumstances unrelated to the unfair labor practices established by" the Court's previous decree.*

So, too, in *NLRB* v. *Pacific Greyhound Lines,* 9 Cir., 106 F.2d 867 (1939), an order against favoring a "company union" was held not violated by favoring, two years later, a different union with which the employer had a

closed-shop agreement on the ground that *an entirely new and different transaction was involved.*

A contrary result was reached in *NLRB* v. *M. Lowenstein & Sons, Inc.*, 2 Cir., 121 F.2d 673, with Circuit Judge Swan dissenting, who observed that a charge "should not serve as a basis for prosecuting, as a contempt of court, an independent unfair labor practice committed years later", noting *Pacific Greyhound Lines, supra,* and observing that "If the later violation is independent of and unrelated to the former, even though of the same general type, the Board should be required to institute a new proceeding of the character provided for by Section 10" (121 F.2d 675). But, it is noteworthy that in a later Second Circuit case (*NLRB* v. *New York Merchandise Co., Inc.*, 134 F.2d 949, 953), it was held that where conditions have changed the hearing must be by the "Board as a Board and not as a master of the court."

The validity of Circuit Judge Swan's dissent is emphasized by the fact that in the years following the 1960 decree's entry, the instant proceeding is the sole time when NLRB has charged the two unions involved had contemned the decree.[15]

Moreover, when unfair labor practice charges were filed with NLRB, the charges related not only to Section 8(b)(7) but also to alleged coercive picketing under 8(b)(1)(A). The alleged coercive conduct, heard by the Sixth Circuit's Master, was linked to, as an integral part of, the alleged 8(b)(7) picketing. NLRB could have, but did not, issue a complaint based upon the 8(b)(1)(A) charges, but came to the Sixth Circuit alleging a civil contempt, despite the fact that in the NLRB hearings of

[15] *NLRB* v. *Local 5881, UMWA*, 6 Cir., 323 F.2d 853 (1963) did not involve either UMW or District 30.

the 8(b)(7) charges the trial examiner admitted in evidence testimony concerning the alleged coercive picketing.[15]

The Sixth Circuit's opinion and judgment violates, too, the admonishment found in *NLRB* v. *Express Publishing Co.*, 312 U.S. 426, 435, where this Court, though concerned with NLRB's authority to issue an order broadly to obey the statute, admonished that "Congress did not contemplate that the courts should, by contempt proceedings, try alleged violations of the National Labor Relations Act not in controversy and *not found by the Board*". Accord: *Morrison-Knudsen, Inc.* v. *NLRB*, 9 Cir., 270 F.2d 864, 865. It accords, too, with the First Circuit's observation *in Reed & Prince Mfg. Co.*, 196 F.2d 759, that if NLRB elects generally to proceed in contempt, courts of appeals "will gradually supplant the Board as the primary trier of facts when future unfair labor practices are alleged."

III. THE SIXTH CIRCUIT'S REJECTION OF MOOTNESS CONFLICTS WITH DOCTRINAIRE WHICH HAS BEEN WELL SETTLED IN IMPORTANT DECISIONS OF THIS COURT AND IT IS AT VARIANCE WITH DECISIONS OF THE DISTRICT OF COLUMBIA CIRCUIT.

The Sixth Circuit rejected Unions' assertion of mootness in their motion to discharge and vacate the Rule (*ante*, p. 5-7) because all picketing had ceased prior to NLRB's filing its contempt petition. Though that court reserved the issue when it sustained NLRB's motion for a Special Master, without passing upon the reserved matters, it held petitioners in civil contempt (A. 23a, *et seq.*).

According to the factual narrative in the Master's report, much of the picketing ceased on April 9 and 11, following Beane's advice to discontinue all picketing (A. 9a) and the last event of picketing reported by the Master occurred on May 10 when, as the Master's report

states, "After a visit to the picket line at Lick Branch by Mr. Hobbs, all those assembled, except one picket, departed the scene behind the Hobbs vehicle" and a state police was advised "by a picket that the picketing would be halted" and "Neither the pickets nor the aforementioned sign were afterward observed there" (A. 13-14a).

In *U. S.* v. *United Mine Workers of America,* D.C. Cir., 190 F.2d 865 (1951), the court of appeals, pointing to *Gompers* v. *Buck's Stove & Range Co.,* 221 U.S. 418, 441, declared that a civil contempt is wholly remedial, to serve only the complainant's purposes, and not to deter offenses against the public or vindicate court authority. There the Government, as complainant, sought by civil contempt to coerce UMW into obeying the restraining order and thus to accomplish the return of miners to their work in the mines. Because these objectives were accomplished when, pending appeal the labor dispute was settled and miners returned to their employment, the District of Columbia Circuit declared that *"under these circumstances the contempt proceeding is moot"* (190 F.2d 873).

Unions had NLRB's word that they had complied with the Sixth Circuit's 1960 decree and for approximately six years thereafter no complaint was made against Unions by NLRB. It is thus evident that at the precise time that NLRB filed its contempt petition all picketing had ceased, and the "end proposed" (*Anderson* v. *Dunn,* 6 Wheat., 204, 231, 5 L.ed 242) by the civil contempt proceedings had eventuated and there was then no remedial sanction for the Sixth Circuit to impose. Since civil contempt's function, namely, "coercion to compel the contemnor to do what the law requires of him", was precisely what Petitioners were doing when NLRB's peti-

tion was filed with the Sixth Circuit (see *Penfield Co.* v. *Securities and Exchange Commission,* 330 U.S. 585, 593), the Sixth Circuit's opinion and judgment herein were directed to a nonexistent situation and to the achievement of a status that already existed. It is thus manifest that NLRB asked the court, in the proceeding's inception, to deal with an abstraction and to do a useless thing.

Gompers' language (221 U.S. 451) is apposite:

> ". . But the very amplitude of the power [of punishing for contempt] is a warning to use it with discretion, and *a command never to exert it where it is not necessary or proper. For that reason we can proceed no further in this case, because it is both unnecessary and improper to make any decree in this contempt* proceeding.
>
> . . . . . .
>
> "But, as we have shown, this was a proceeding in equity for civil contempt, where the only remedial relief possible was a fine, payable to the complainant. The company prayed 'for such relief as the nature of its case may require,' and *when the main cause was terminated by a settlement of all differences between the parties, the complainant did not require, and was not entitled to, any compensation or relief of any other character. The present proceeding necessarily ended with the settlement of the main cause of which it is a part.*"

As *U. S.* v. *United Mine Workers of America* avowed, "under these circumstances the contempt proceeding is moot" (*ante,* p. 36), the Sixth Circuit should not have accepted jurisdiction in this case. The undisputed facts make manifest its error in the issuance of its decision of contempt, and particularly its issuance of sanctions against Petitioners.

IV. SANCTIONS IMPOSED BY THE SIXTH CIRCUIT'S OPINION AND JUDGMENT DO NOT ACCORD WITH THIS COURT'S PRIOR DECISIONS IN CIVIL CONTEMPT CASES. THE OPINION AND JUDGMENT ERRONEOUSLY EXPAND THE ENFORCEMENT ORDER.

A civil contempt proceeding is wholly remedial, to serve only the purposes of the complainant, as expressed in *Penfield Co.* v. *Securities & Exchange Commission,* 330 U.S. 585, 590; *McCrone* v. *U. S.,* 307 U.S. 61, 64; *Gompers* v. *Buck's Stove and R. Co.,* 221 U.S. 418, 441. Accord: *Nelson* v. *Steiner,* 7 Cir., 279 F.2d 944 (1960); *U. S.* v. *UMWA,* D.C. Cir., 190 F.2d 865 (1951). Under undisputed evidence, no remedial action was essential when the petition was filed. Moreover, since complainant is NLRB, a remedial fine is limited to costs and necessary expenses to prosecute the contempt petition. Such a fine would have been appropriate had it been *necessary* for the Board to take this action to require that alleged contemnors cease certain conduct. As already pointed out (*ante,* pp. 6, 7, 34), NLRB was already processing an unfair labor practice charge based upon precisely the same facts presented in the instant action. NLRB now seeks enforcement of its adverse order to UMW in the 8(b)(7) case in *NLRB* v. *District 30, UMW, et al.,* No. 18,383, in the Sixth Circuit. NLRB has, in effect, prosecuted an unfair labor practice case under guise of contempt.

Moreover, since the instant Sixth Circuit order imposes a conditional $25,000 fine and $1,000 per day on Union Petitioners, and $5,000 or imprisonment of "30 days for each such violation" upon individual Petitioners (A. 29a), for which there is no evidentiary warrant, both Union and individual Petitioners must conduct their duties under threat of fine or, in the case of the individuals, imprisonment for conduct of people over whom they have

no control and for conduct of which they may have no knowledge, committed by unknown persons, leaving to each a hope that a future trier of facts would disbelieve testimony of employers involved in a unionizing campaign. The Sixth Circuit has indulged in pure legalism to inflict punishment upon Petitioners whose conduct otherwise could not be attacked. Since civil contempt is wholly remedial, inclusion of the enormous fines poses inquiry whether payment is to the court or NLRB. If to the former, *Penfield, Gompers* and other federal cases cited condemns it.

Similar threat is found in the Sixth Circuit's order wherein it provides that future violations will cause the court to deal therewith by such other means as it deems appropriate, including issuance of a body attachment against persons responsible for noncompliance (A. 29a). *Gompers* rejects such a provision in a civil contempt proceeding. Nothing in the record supports this provision; and, since this is the first instance since 1960 that NLRB has suggested a violation of the 1960 decree so far as Union Petitioners are concerned, language found in *NLRB* v. *Reed & Prince Mfg. Co.* (196 F.2d 755) is meaningful where it says "the present does not seem to be a case of a repeated offender, playing hide-and-seek with the Board in the manner suggested." Threat of imprisonment is indeed more appropriate in criminal contempt proceedings where the law provides procedures totally different from those in civil contempt and protective of those charged with contempt. Inclusion of the provision in the instant case suggests pre-judgment by the Sixth Circuit and lack of due process.

NLRB's original order, enforced by the 1960 decree, was limited to "employees . . of any employer . . of Dis-

trict 30's territorial jurisdiction (A. 35a). The instant order expands NLRB's original order by requiring Petitioners to purge themselves by ceasing to restrain and coerce employees of Terry Elkhorn, Mahan and Wright *"or of any other employers"* within District 30's jurisdiction (A. 27a). The Sixth Circuit thus goes beyond the scope of the petition, the hearing and evidence, which *NLRB* v. *Express Publishing Co.*, 312 U.S. 426 and *Communications Workers* v. *NLRB*, 362 U.S. 479 condemns. The Fifth Circuit's *NLRB* v. *Local 926*, 5 Cir., 267 F.2d 418, 421, appropriately notes that "more important, and basic to a fair administration of the Act", is "the hard-won principle of Anglo-American law that a judgment must find adequate support in the record." An order of a court "that goes beyond the record to penalize an offender as a bad actor smacks too much of attainder to be acceptable . ." The foregoing condemns also the Sixth Circuit's inclusion in the order which mandates that Petitioners purge themselves by not *"Violating in any other manner this Court's decree of May 20, 1960"* (A. 28a).

In any event, the order lacks the support of clear and convincing proof as required by Norris-LaGuardia's Section 6 and other applicable law.

CONCLUSION

For the reasons assigned, Petitioners, and each of them, pray that the Petition for Writ of Certiorari should be granted and that the Writ issue to review the opinion and judgment of the Sixth Circuit, entered in Case No. 14,226, on April 18, 1968, as aforesaid.

Respectfully submitted,

EDWARD L. CAREY
HARRISON COMBS
WILLARD OWENS
900 Fifteenth Street, N.W.
Washington, D. C.

H. B. NOBLE
304 Main Street
Hazard, Kentucky

M. E. BOIARSKY
511 Kanawha Valley Building
Charleston, West Virginia
Attorneys for Petitioners.

Dated: July 15, 1968

APPENDIX A

REPORT OF SPECIAL MASTER

In the United States Court of Appeals for the Sixth Circuit

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

UNITED MINE WORKERS OF AMERICA, and DISTRICT 30, UNITED MINE WORKERS OF AMERICA, *Respondents*

No. 14,226

REPORT OF SPECIAL MASTER

This cause, referred to me as special master on January 3, 1967 was heard, after due notice, on first meeting of the parties on February 28, 1967 in Greeneville, Tennessee. See Interim Report submitted on March 7, 1967. It was further heard to obtain oral and documentary evidence from witnesses made available by the parties and under the compelling process of the special master on June 1, 2, 5 and 6, 1967 in the courtroom of the United States District Court at Greeneville, Tennessee. See Second Interim Report submitted on June 23, 1967. The last of the suggestions from respective counsel for the petitioner and the respondents for proposed findings of fact and conclusions were received by the special master on November 1, 1967. The evidence and briefs of counsel having been considered, and the special master being fully advised, the following report and recommendations for findings of fact and conclusions of law herein are herewith respectfully submitted for the Court's consideration.

I
THE ISSUE

The issue presented is whether the respondents United Mine Workers of America and District 30, United Mine Workers of America, through their agents, and especially Messrs. C. E. Beane, Joseph Castle, Joseph Davis, Noble Hobbs, Walter Akers and J. D. Newberry, failed to comply with that part of the decree of this Court of May 20, 1960, which directed that the respondents and their officers, agents, successors and assigns not:

> "* * * Restrain and coerce employees * * * of any * * * employer engaged in coal mining operations or in processing, transporting and/or distributing coal within the geographical limits of the territorial jurisdiction of District 30, United Mine Workers of America * * * in the exercise of their rights guaranteed by Section 7 of the [National Labor Relations] Act, by engaging in and/or participating in conduct more fully described * * *" as:
>
> > "* * * Exerting force or committing acts of force and violence against said employees, injuring the person or damaging the property of said employees by following them in superior numbers, using or threatening to use force or violence against said employees, assaulting employees, attempting to assault employees, threatening them with reprisals, barring their ingress to and egress from their places of employment, preventing them physically from working or in any other manner restraining or coercing them in the exercise of said rights. * * *"

II
FACTUAL NARRATIVE

Terry Elkhorn Mining Company, Inc.[1] was in 1966 an employer engaged in the mining, processing, selling

[1]Hereinafter referred to as Elkhorn.

and shipping of coal at and from locations in Floyd and Johnson Counties, Kentucky. This employer engaged in strip mining of coal at its Lick Branch mine, which was located approximately 1½ miles north of Prestonburg near the top of a mountain, and engaged in auger mining of coal at its Long Branch mine, which was located approximately 5½ miles north of Prestonburg. It also operated coal tipples at Sun Valley and Hagar Hill, which were located about three blocks apart and about 10 miles north of the mouth of its Lick Branch mine. All these operations were in the vicinage of U. S. highway route no. 23. Elkhorn also leased property at the village of Auxier from the Chesapeake & Ohio Railway Company, which property was located about four miles north of the mouth of the Lick Branch mine and about one mile west of the Auxier bridge, spanning the Big Sandy River, and had contracted with another employer, Mr. Marshall C. Mahan, to construct and operate in 1966 on a tonnage fee basis, a tipple on such property. All the coal mined by Elkhorn in 1966 at these mines was transported to the aforenamed tipples in trucks of other employers, Harry Wright Construction Company, Inc. and Billy Ray Howard,[2] processed, loaded into railroad gondola cars, and shipped. All but about ten per cent (10%) of such coal was shipped to points outside the Commonwealth of Kentucky.

The aforenamed employers' operations in the aforementioned area were within the geographical limits of the territorial jurisdiction of the respondent District 30, United Mine Workers of America. The collective bargaining agreements mentioned herein between employers

---

[2]It is not clear whether Mr. Howard was an independent contractor or merely a driver, for whom another substituted, *infra*, for Harry Wright Construction Company, Inc.

in this industry of this area were between the respondent United Mine Workers of America and such employers. District 30, United Mine Workers of America is a non-autonomous subdivision, or provisional district, of its co-respondent United Mine Workers of America,[3] which governs it and provided 85% of its operational expense.

The aforenamed Mr. Beane served in 1966, by appointment of the president of UMW, as president of its District 30. The aforementioned Messrs. Hobbs, Castle and Davis served UMW in 1966 as field representatives. Each of those aforenamed immediately above had actual notice of the aforementioned decree. The aforementioned Mr. Akers, who served UMW in 1966 in a similar capacity, had constructive notice thereof. The aforenamed Mr. Newberry was a member in District 30 of UMW, resided near the Auxier tipple, and also had constructive notice *notice* of such decree.

Early in 1966 there were complaints by UMW members in the area that Elkhorn was operating with non-union labor, although some employees of Elkhorn and Mr. Mahan had by then joined the union. Messrs. Castle and Hobbs went into the area and investigated this report on March 31, 1966. From this beginning intensive and widespread strife developed. Varying pickets roved the area, after the arrival of agents of the respondent UMW on the scene, and after they had participated in such picketing. The picketing continued, as will be seen, even after the aforenamed Mr. Beane had advised against the action. As will be seen further hereinafter, the UMW pickets were not withdrawn by the respondent UMW until about a month after Mr. Beane had given his "advice". Once its representative Mr. Hobbs acted, however, there

[3]Referred to hereinafter as UMW.

was no further formal picketing, although violence both ante-dated and post-dated such withdrawal.

The following incidents, all in the calendar year 1966, occurred:

March 31:

The immediately aforenamed UMW field representatives met with about a dozen union members, pensioners and Elkhorn employees near the Auxier bridge and discussed organizing Elkhorn and its related operations. Subsequently, they went onto the aforesaid leased property. Several dozen men were assembled in the vicinity. Mr. Castle and Mr. Estill Newsome parked their automobiles in such a manner as to block the customary ingress to and egress from the tipple. Several trucks of Harry Wright Construction Company, Inc. were immobilized as a result. Mr. Mahan's request that Mr. Castle remove his vehicle was refused rudely.

The interruption in the steady flow of the trucks of the Wright company caused Mr. Charles Hovatter, Elkhorn's president and principal stockholder, to proceed from the Link Branch mine to the Auxier tipple to investigate. He also asked that the vehicles be moved and was met with inaction (although Mr. Castle subsequently moved his automobile). Messrs. Hovatter and Mahan decided to cause warrants of arrest to issue for Messrs. Newsome and Castle. As Mr. Mahan was noting the needed information from the pertinent license plates, Mr. Castle attempted unsuccessfully to jerk notebook and pencil from Mr. Mahan's hands. While the trucks were thus aligned, the drivers were solicited and joined the union. The pickets soon left the scene, but Mr. Mahan's employees refused to resume operation of the

[4]Referred to now as the Wright company.

tipple. After processing nine truckloads of coal himself, Mr. Mahan stopped operations for the day.

Mr. Hobbs and Mr. Newberry then proceeded to the Lick Branch mine area, parking at the bottom of the mountainside, where the mining operations were in progress. They conversed with a dozen or so men, including a few employees of Elkhorn, then walked into the mining area. At the request of the visitors, Elkhorn's foreman ceased operations while Elkhorn's employees there were solicited for UMW membership. It was pointed out by the organizers that Elkhorn's mines were the only ones in Floyd County which were unorganized. One picket stated to a heavy drilling equipment operator for Elkhorn there that the Link Branch mine "* * * would be organized even if it took bloodshed. * * *" Messrs. Castle, Hobbs and Newberry participated in the establishment of a picket line near the ingress to this mine.

April 2:

Operations at the tipple at Auxier were resumed and two shifts worked without interruption.

April 3:

A large number of pickets assembled near the Auxier tipple, with Kentucky state policemen and Messrs. Castle, Hobbs, Akers, Davis and Newberry present. Messrs. Akers and Davis urged Mr. Mahan to sign a contract with UMW. Mr. Castle then spoke with Mr. Mahan, advising that a few of Mr. Mahan's employees had signed UMW union cards and asked him to sign a union contract. Mr. Mahan refused. A conversation ensued between Mr. Hobbs and Mr. Mahan, in which Mr. Mahan requested the pickets to leave. Mr. Hobbs replied that organizing was his job, and that the effort would be made to organize the operation peacefully and lawfully.

Mr. Harry Wright was driving one of the trucks of the Wright company and was on this scene. Mr. Hobbs approached Mr. Wright and observed a pistol lying beside him on the seat of the truck. Mr. Hobbs then remarked: "* * * You're going to get in trouble. * * *" Mr. Akers also asked Mr. Wright to join the union. On seeing the pistol, Mr. Akers subsequently advised Mr. Wright that such "* * * isn't the right thing [sic: way] to do a thing. You could sign a card, and I believe these men could pay fellows a decent wage. * * *" Mr. Wright mentioned his economic obligations in declining union membership.

One of Mr. Mahan's employees had endeavored to move an empty gondola into position for loading at the tipple, but was prevented by pickets. Mr. Mahan then took a pinchbar and undertook to accomplish the task, but he was prevented by Mr. Hobbs from making the necessary uncoupling of the railroad cars involved. Mr. Mahan pushed Mr. Hobbs aside, and several dozen men surrounded the two as shoving continued. One such picket forcibly took the pinchbar from Mr. Mahan but returned it at the direction of Mr. Hobbs. More pushing followed, and one of the pickets asked Mr. Mahan "* * * how I would like it if he took the pinchbar and beat hell out of me." Mr. Mahan subsequently ducked under the gondola to attempt to move it from the opposite side of the tracks, but he was prevented from so doing by pickets. Operation of the tipple at Auxier was then again suspended, pending hearing on an application to a state court for an injunction. An agreement was reached, however, between Messrs. Hobbs and Mahan that the tipple might be operated long enough to permit unloading of the loaded trucks present. Some two dozen pickets remained on the scene while this was done. Activity then ceased. Sometime that day some of the pickets, assisted

by Messrs. Hobbs and Akers, gathered roofing nails which had been scattered earlier over areas normally traversed by the Wright company's trucks.

April 4:

Messrs. Castle and Newberry and about 100 pickets tried to persuade an Elkhorn foreman at its Hagar Hill tipple to stop operations. When the request was ignored or denied, Mr. Castle stated that "* * * someone would come after * * *" the foreman. Following more than an half-hour's interruption, Mr. Castle agreed that the foreman could complete the processing of coal on hand, but that he must cease thereafter and remain inoperative.

On or after this date, the Wright company's trucks were escorted in convoys by a pickup truck as Elkhorn's coal was transported. After speeding automobiles loaded with pickets began passing the convoys, while passengers therein displayed pistols, and sometimes interrupted the convoy lines, a second pickup truck was added for escort purposes.

April 5:

With large numbers of pickets present on the scene, including Messrs Akers and Hobbs, the tipple at Auxier did not undertake operations.

April 6:

From this date a sign bearing the legend "UMW of A Pickets" was prominently displayed daily near the ingress to the Lick Branch mine.

Mr. Wright was delivering coal from that mine to the tipple at Auxier when he was accosted by Mr. Akers: "Harry I don't want to see you hurt," the latter said, "I would like to see you park your truck[s]; I would appre-

ciate it if you pull them off and park them." Mr. Akers was on the picket line that day. As Mr. Wright departed in his truck, pickets nearby called out to him: "You had better park it. We are going to burn your trucks down, and we are going to burn your trailer and will also beat you down beside them."

April 7:

Operations were resumed at Auxier, but Mr. Mahan discontinued such for about three weeks, after his employees had advised him that they were frightened and were unable to do their work with so many men milling around in the tipple area.

April 8:

Mr. Akers was on the picket line near Lick Branch. Mr. Castle was also there and threw rocks at a truck Mr. Wright was driving, after which other pickets also threw rocks thereat.

April 9:

Mr. Castle and between 70 and 100 pickets came to the tipple at Sun Valley and talked with Elkhorn's employees for about an hour. The automobiles of Mr. Castle and another were parked under the tipple there. Kentucky state policemen refused to remove the pickets from the premises without a court order.

Mr. Beane held a meeting with some of those operating as roving pickets and others at the schoolhouse at Auxier and advised them to cease all picketing.

April 11:

Mr. Beane conducted a meeting of a larger group in Pikeville and again advised those assembled to discontinue all picketing.

Pickets were partially concealed behind parked automobiles near the entrance to the Lick Branch mine. As two drivers for the Wright company passed in a truck, the pickets threw rocks at it, breaking the glasses in its windshield and cab door and striking both employees. One such employee sustained facial injuries and required surgical excision of particles of glass from his eye.

A driver for Mr. Howard stopped at a filling station on the federal highway route at about this time to have a tire repaired. Almost simultaneously, Mr. Newberry brought his automobile there for repair of its brakes. Soon, about 25 additional pickets appeared on the scene, and one of them instructed this driver to dump his load of coal there. While the driver was in the process of following this mandate, a sledgehammer was thrown into the windshield of the truck. The driver leaped from its cab, whereupon two pickets grasped and held him while Mr. George Vaughn struck him on the head with a piece of 10-inch pipe. The pickets thereupon forced the driver back into the cab and told him to act more quickly in dumping the coal. Even as he complied, the pickets struck the windshield and side of the cab with the sledgehammer and a tiretool, resulting in a breaking of the windshield and the inflicting of lacerations on the driver's face from the flying glass. (During all this commotion Mr. Newberry, who was in the service-bay area of the filling station with the doors opened, disclaimed all knowledge of the incident and stated self-servingly to the attendant: "* * * Now, you know I didn't have nothing [sic] to do with this; I was right here with you. * * *") The truck was eventually removed from the scene, and the attendant removed the coal from his premises.

April 19:

About 20 from a group of some 200 pickets "hunkered down" farther down the hollow from the larger group near the ingress to the Lick Branch mine and attacked with rocks a truck driven by Mr. Wright's son. As Mr. Wright sought to investigate and intercede, and as he was alighting from a following truck, he was struck in the area of his right kidney by a large rock and was knocked to the ground. When he recovered sufficiently to re-enter the cab, a picket, who was holding UMW union membership application cards in his hand, approached and said: "* * * Now G-- d--- you; will you sign one now? * * *" A steel ball-bearing was found lodged in the window glass of the cab of Mr. Wright's truck, and a slingshot was discovered nearby. Subsequently, Mr. Wright was hospitalized because of injuries he received in this attack. He has been unable to drive a truck since.

April 20:

After a rapidly-accelerating automobile was observed departing the area of the coal hopper thereat, the tipple at Sun Valley was discovered to be afire. The remnants of a so-called "Molotov cocktail" were found in the coal hopper.

Mr. Newberry issued a call by spot announcements on a local radio station for a meeting of all members of "* * * UMWA, District 30 * * *" on the following day near Prestonburg.

April 21:

An estimated 500 pickets and other persons met at a point near Prestonburg with Mr. Newberry present. (This, despite the fact that Mr. Newberry claims that such meeting was cancelled when "* * * there wasn't

[sic] but one or two there [sic] of the boys showed up * * *.")

A truck of the Wright company hauling coal to the tipple at Hagar Hill stopped for tire repairs at the aforementioned filling station. While Mr. Newberry was present, the coal was dumped by pickets from the truck, and its windshield and window glasses were broken. A hole was also knocked in its side.

May 6:

Mr. Newberry and approximately 100 other pickets were "heckling" the nightwatchman at the tipple at Auxier. Mrs. Mahan accompanied her husband to the scene and remained in their automobile while Mr. Mahan moved a gondola so that light from the tipple would illuminate the watchman's automobile. In his absence therefrom, the Mahan vehicle was rocked from side to side by the pickets. As Mr. Newberry stood nearby, another picket shouted to Mr. Mahan: "* * * You don't have to worry about getting a watchman for your tipple tonight; because we are going to have some women that are going to come down and take care of the watchman, and [during that time] we are going to take care of the tipple. * * *" Mr. Newberry interjected the admonition: "You mustn't talk like that; don't say things like that. I'll guarantee that the tipple will not operate tomorrow, but, don't say things like that." Shirley Hayden was standing with the same group and added: "Well, I'll see that the tipple doesn't operate, because I have the kerosene." Whereupon, another picket added, "I have the match", and yet another said: "If that doesn't work, I have the dynamite." Mrs. Mahan then overheard someone in the group call to Mr. Mahan: "Before I die I'm going to kill you."

Latter part of April:

Someone in an assemblage of pickets at Auxier shot a firearm at Mr. Mahan's watchman and tossed firecrackers and rocks in his direction from the undergrowth nearby. Mr. Mahan added a second nightwatchman, and these two were advised by an assemblage of 100 to 175 women to "* * * go home. * * *" When the latter incident was reported to Mr. Mahan, he released the watchmen from such duty.

Late April, early May:

Pickets undertook to cause convoys of the Wright company to slow down the movement of coal and empty trucks by means of vehicles. When the trucks were accelerated to effectuate passing, the automobiles were accelerated more. On one occasion, a picket waved a stick of dynamite out of the window of one of the vehicles. On other occasions, the mobile pickets shouted to the drivers by name with threats, such as: "* * * We are going to stop you one way or another; we will get you next time. * * *"

March 31 through May 10:

Pickets cursed Elkhorn's employees at its Lick Branch mine, called them "scabs", "yellow dogs", and strikebreakers", and threatened them with bodily harm if they continued to work. They also placed mine-rail spikes, welded onto roof-bolt washers, into water holes in the roadway of the ingress and egress to the mine.

May 10:

After a visit to the picket line at Lick Branch by Mr. Hobbs, all those assembled, except one picket, departed the scene behind the Hobbs vehicle. A Kentucky state policeman was then advised by a picket that the picket-

ing would be halted. Neither the pickets nor the aforementioned sign were afterward observed there.

May 17:

This was the second day of renewed operations of the tipple at Auxier. Although only a very few pickets were present, a host of women and children of school age blocked the ingress and egress of trucks of the Wright company and the egress of the Mahan vehicle. The latter was finally moved, only with the help of Kentucky state policemen. This tipple, having been rendered inoperable for about two-thirds of the time since March 31, was closed down permanently.

Late May:

Employees of Mr. Mahan, on inspection of the tipple at Auxier, discovered that several holes had been burned in the ramp and extensive damage had been done to the crusher and toolshed, which the inspector concluded, as to the latter, could have resulted only from an explosion. About a week afterward, further inspection revealed that the crusher had been torn off its foundation, the coal-feeder had been torn out, and a motor had burst, probably as a result of a further explosion.

III

RECOMMENDATIONS FOR FINDINGS OF FACT BY THE COURT

At all times pertinent to this proceeding:

(a) Elkhorn, the Wright company and Mr. Mahan were engaged in operations affecting interstate commerce within the meaning of the National Labor Relations Act, 28 U. S. C. §§ 152 (6) and (7).

(b) The respondents UMW and District 30, UMW, and the aforenamed Messrs. Beane, Castle, Davis, Hobbs, Akers and Newberry clearly, unequivocally and convincingly participated, or were interested, in the aforementioned labor dispute, and as agents of the respondent United Mine Workers of America, committed, or constructively ratified, unlawful acts within the meaning of the Norris-LaGuardia Act, 29 U. S. C. § 106.

(c) The respondent UMW, through the aforementioned agents, violated this Court's decree of May 20, 1960, within the jurisdiction of this Court, by: committing acts of violence upon, physically assaulting and threatening with violence employees of Elkhorn, the Wright company and Mr. Mahan; causing physical injury to some of the said employees; inflicting considerable damage to properties of the aforenamed employers; following the said employees in superior numbers; attempting to bar and barring the ingress to and egress from such employees' places of employment; attempting to and physically preventing such employees' working; and, by restraining and coercing such employees in the exercise of rights guaranteed them by 29 U. S. C. § 157.

(d) The aforesaid acts of disobedience of this Court's said decree and the law all occurred prior to July 8, 1966, the date of the petitioner's filing of an application to have the respondents adjudged in civil contempt.

IV

RECOMMENDATIONS FOR CONCLUSIONS OF LAW BY THE COURT

(a) It is an unfair labor practice for agents of a labor organization to restrain or coerce employees of employers, as defined by 29 U. S. C. §§ 152 (6) and (7), in the

exercise of such employees' rights to refrain from exercising their rights of self-organization, of forming, joining or assisting labor organizations, and of bargaining collectively or for other mutual aid or protection. 29 U. S. C. § 158 (b) (1) (A).

(b) The aforementioned decree of this Court laid upon the respondent UMW a duty to obey the aforementioned proscription of 29 U. S. C. § 158 (b) (1) (A). *Cf. McComb v. Jacksonville Paper Co.*, 336 U. S. 187, 191-192 (headnote 4) (1949).

(c) The substantive standard against which the conduct of the aforenamed agents of the respondent United Mine Workers of America is measured is the statutory standard of 29 U. S. C. § 158 (b) (1) (A).

(d) This proceeding in contempt is a part of the original action. *Gompers* v. *Buck's Stove and R. Co.*, 221 U. S. 418, 446 (1911).

(e) Absence of the element of willfulness on the part of the respondent UMW does not relieve such respondent of guilt of civil contempt of this Court. *McComb* v. *Jacksonville Paper Co., supra,* 336 U. S. at 191 (headnote 1); see also *United States* v. *United Mine Workers of America,* 330 U. S. 258, 303-304 (1947) and *Penfield Co.* v. *Securities & Exch. Com.*, 330 U. S. 585, 590 (1947).

(f) The proof against the aforenamed agents of the respondent United Mine Workers of America of the aforementioned violations met the requisite modicums of establishment by clear and convincing evidence fixed in *Kansas City Power & Light Co.* v. *National L. R. Board,* 137 F.2d 77, 79 [1] (C.A. 8, 1943); *N. L. R. B.* v. *Local 5881, United Mine Workers of America,* 323 F.2d 853, 854 (C.A. 6, 1963); *National Labor Relations Bd.* v. *Tupelo*

Garment Co., 122 F.2d 603, 606 [2] (C.A. 5, 1941); *Oriel* v. *Russell*, 278 U. S. 358, 364 (1929); *California, Etc. Stone Paving Co.* v. *Molitar*, 113 U. S. 609, 618 (1885); and *National Labor Relations Board* v. *Standard Trouser Co.*, 162 F.2d 1012, 1014 [1] (C.A. 4, 1947).

(g) "Clear and convincing evidence" is "something more than a bare preponderance of evidence." *Kansas City Power & Light Co.* v. *National Labor Relations Board, supra*, 137 F.2d at 79; *National Labor Relations Board* v. *Tupelo Garment Co., supra*, 122 F.2d at 606.

(h) Every order granting an injunction is binding upon the parties to the action, their agents, and those persons in active concert or participation with them who receive actual notice of the order. Rule 65 (d), Federal Rules of Civil Procedure. The scope of this Court's enforcement order of May 20, 1960 is limited by the rule cited immediately hereinabove. *Regal Knitwear Company* v. *National Labor Relations Board*, 324 U. S. 9, 13 (headnote 4) (1945). The aforenamed Messrs. Akers and Newberry were not personally bound by such order.

(i) "* * * The actions of one individual member no more bind the union than they bind another member unless there is proof that the union authorized or ratified the acts in question. * * *" *United States* v. *White*, 322 U. S. 694, 702 (1944); see 31 Am. Jur., —, Labor, §§ 135 et seq.: see also 100 A. L. R. 2d 694, 702. The evidence must be sufficient to support a finding that the respondent knowingly disobeyed the Court's order, *United States* v. *Hall*, 198 F.2d 726, 729 (C.A. 2, 1952), and that the contemnor had knowledge of the order. 18 U. S. C. § 401 (3); *Kelton* v. *United States*, 294 F. 491, 494-495 [5] (C.C.A. 3, 1923). However, the direct knowledge of the respondent UMW of the aforementioned decree was

imputed to its aforenamed agents, in so far as is concerned the liability of such respondent for the violative acts of Messrs. Newberry and Akers, to each of whom such respondent neglected to communicate such direct knowledge. *Holly* v. *Manuf'g Co.* v. *New Chester Water Co.*, 48 F. 879, 889 (D.C.Pa., 1891); *Sawyer* v. *Mid-Continent Petroleum Corp.*, 236 F.2d 518, 520 [1] (C.A. 10, 1956).

(j) Only ordinary evidence was required to establish the authority of the aforenamed individuals to act as agents of the respondent UMW in performing their respective specific acts, *supra.* 29 U.S.C. §152 (13); House Conference Report No. 510 on H. R. 3020, 80th Congress, 1st Session, 36 (1947). As has been recently said:

"* * * Although the statute does not define 'clear proof', its history and rationale suggest that Congress meant at least to signify a meaning like that commonly accorded such similar phrases as 'clear, unequivocable, and convincing proof'. Under this standard, the plaintiff in a civil case is not required to satisfy the criminal standard of reasonable doubt on the issue of participation, authorization or ratification; neither may he prevail by meeting the ordinary civil burden of persuasion. He is required to persuade by a substantial margin, to come forward with 'more than a bare preponderance of the evidence to prevail.' * * *" *United Mine Workers* v. *Gibbs*, 383 U. S. 715, 737 [15] (1966). "* * * What is required is proof, either that the union approved the violence which occurred, or that it participated actively or by knowing tolerance in further acts which were in themselves actionable under state law or intentionally drew upon the previous violence for their force. * * *" *Ibid.*, 383 U. S. at 739 [17]. "* * * The relevant question

* * * is whether [the union's agents] * * * or other UMW representatives were clearly shown to have endorsed violence or threats of violence as a means of settling the dispute. * * *" *Ibid.*, 383 U. S. at 741 [17].

(k) The respondent District 30, UMW and the respondent UMW comprised the same legal entity. *United Mine Workers of America* v. *Osborne Mining Co.*, 279 F.2d 716, 725 [8] (C.A. 6, 1960), cert. den. 364 U. S. 881 (1960).

(l) The respondent UMW was vicariously responsible for the aforementioned acts of its aforenamed field representatives and Mr. Beane, all which were in the course and scope of their respective employments. *United Mine Workers of America* v. *Patton*, 211 F.2d 742, 746 [2] and cases there cited (C.A. 4, 1954).

(m) The contention of the respondents that the "* * * purpose of a civil contempt proceeding is not as a deterrent to offenses against the public or to vindicate the authority of the Court * * *", and their further contention that a proceeding in civil contempt is wholly remedial and "* * * is to serve only the purposes of the complainant * * *", have no foundation in the cases cited in support thereof, *viz.*, *Penfield, supra; McCrone* v. *United States*, 307 U. S. 61, 64 (1939); and *Gompers, infra.* In the latter opinion, the late Mr. Justice Lamar wrote: "* * * When the main case was settled, every proceeding which was dependent on it, or a part of it, was also necessarily settled, of course, *without prejudice to the power and right of the court to punish for contempt by proper proceedings.* * * *" *Gompers* v. *Buck's Stove & R. Co., supra*, 221 U. S. at 451 [emphasis supplied].

* * * * *

"* * * The dual function of contempt has long been recognized—(1) vindication of the public interest by punishment of contemptuous conduct; (2) coercion to compel the contemnor to do what the law requires of him. * * * 'The purpose of contempt proceedings is to uphold the power of the court and also to secure to suitors therein the rights by it awarded.' * * *" *Penfield* v. *Securities & Exch. Comm., supra,* 330 U. S. at 593.

Counsel evidently seek to re-fashion a "rule of law" which would serve to succor the interests of their clients by rearranging the following language of Mr. Justice Black, whereby, in distinguishing criminal contempt from civil contempt, he defined civil contempt as being: "* * * when the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public. * * *" *McCrone* v. *United States, supra,* 307 U. S. at 64.

(n) The various acts of misconduct attributed to the aforenamed individuals, excepting Mr. Beane, manifestly violated this Court's order of May 20, 1960 and 29 U. S. C. §158 (b). (1) (A). *Cf. National Labor Relations Board* v. *Local 5881, United Mine Workers of America, supra,* 323 F.2d at 961-962; *National Labor Relations Bd.* v. *United Mine Workers,* 195 F.2d 961-961-962 (C.A. 6, 1952), cert. den. 344 U. S. 920 (1953); *National Labor Relations Board* v. *United Mine Workers,* 202 F.2d 177, 179 (C.A. 3, 1953); *National Labor Relations Bd.* v. *United Mine Workers,* 190 F.2d 251, 252 (C.A. 4, 1951); *National Labor Relations Bd.* v. *United Mine Workers,* 198 F.2d 389, 390-391 (C.A. 4, 1952), cert. den. 344 U.S. 884 (1952); *Highway Truck Drivers and Helpers, Local 107 IBT* v. *National Labor Relations Board,* 273 F.2d 815, 818 (C.A.D.C., 1959), even where under these circumstances

such conduct occurred outside the presence of the aforementioned employees or was directed against non-employees. *United Mine Workers of America* v. *Osborne Mining Co., supra,* 279 F.2d at 725.

(o) Threats, intimidation and coercion do not escape the pale of illegality because they did not prevent some persistent employees from working. *Progressive Mine Workers* v. *National Labor Rel. Bd.,* 187 F.2d 298, 301 [3] (C.A. 7, 1951); see also *National Labor Relations Board* v. *Ford Bros.,* 170 F.2d 735 (C.A. 6, 1948).

(p) This Court's decree of May 20, 1960 was a command to Mr. Beane, who was officially responsible for the conduct of the affairs of the respondent UMW in its District 30. He was apprised of the writ directed to the respondents and failed to take appropriate action within his power to inspire the performance of the union's duty thereunder. Consequently, he, no less than the union itself, is guilty of disobedience and will be punished for contempt. *Parker* v. *United States,* 126 F.2d 370, 379 [11] (C.A. 1, 1942); see also *Wilson* v. *United States,* 221 U.S. 361, 376 (1911).

(q) The other aforenamed individuals instigated unlawful conduct on the part of other persons, and each is liable for the actions of those whom he induced to act unlawfully. *International B. of E. W.* v. *National L. R. Bd.,* 341 U. S. 694, 701, 703 (1951), affirming 181 F.2d 34, 38-39 (C.A. 2, 1950). A person is chargeable for the "* * * foreseeable consequences of his conduct. * * *" *Radio Officer's Union* v. *N. L. R. B.,* 347 U. S. 17, 45 (1954).

(r) Costs are imposed against the respondent UMW, including the expenses necessarily incurred by the petitioner National Labor Relations Board in connection with

the prosecution of this petition in civil contempt, its investigation, preparation, presentation and the final disposition hereof. *National Labor Relations Board* v. *Local 5881, United Mine Workers of America, supra; cf. National Labor Relations Board* v. *Star Metal Manufacturing Co.*, 187 F.2d 856, 857 [1] (C.A. 3, 1951); *National Labor Relations Board* v. *Nesen*, 211 F.2d 559, 564 [6] (4) (C.A. 9, 1954), cert. den. 348 U.S. 820 (1954).

V

The special master has not, as permitted by the order of reference herein, submitted a draft hereof to counsel for the parties for the purpose of receiving their suggestions, but a copy hereof is being served herewith upon leading counsel for the parties.

With this report are filed the transcript of the prosceedings held before, and of the evidence received by, the special master, as well as a motion to correct same. Neither the petitioner nor the respondent offered for the record any evidence excluded by ruling of the special master, although full opportunity so to do was accorded the parties by the special master.

The special master hereby waives all compensation for services, and he incurred no expenses in connection therewith.

Respectfully submitted,

C. G. Neese
Special Master

APPENDIX B

OPINION OF THE SIXTH CIRCUIT

Filed Apr. 18, 1968—Carl W. Reuss, Clerk

No. 14226

United States Court of Appeals

FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
UNITED MINE WORKERS OF AMERICA, AND DISTRICT 30, UNITED MINE WORKERS OF AMERICA,
Respondents.

ON PETITION of the National Labor Relations Board for Adjudication in Civil Contempt.

Decided April 18, 1968.

Before WEICK, Chief Judge, and PHILLIPS and EDWARDS, Circuit Judges.

PER CURIAM. The National Labor Relations Board filed a petition to adjudge in civil contempt United Mine Workers of America, District 30 United Mine Workers of America and their agents, C. E. Beane, Joseph Castle, Joseph Davis, Noble Hobbs, Walter Akers and J. D. Newberry, in that said respondents failed and refused to comply with the decree of this Court of May 20, 1960. Said decree directed that respondents and their officers, agents, successors and assigns, not:

". . . Restrain and coerce employees . . . of any . . . employer engaged in coal mining operations or in processing, transporting and/or distributing coal within the geographical limits of the territorial jurisdiction of District 30, United Mine Workers of America . . . in the exercise of their rights guaranteed by Section 7 of the [National Labor Relations] Act, by engaging in and/or participating in conduct more fully described . . . as:

". . . Exerting force or committing acts of force and violence against said employees, injuring the person or damaging the property of said employees by following them in superior numbers, using or threatening to use force or violence against said employees, assaulting employees, attempting to assault employees, threatening them with reprisals, barring their ingress to and egress from their places of employment, preventing them physically from working or in any other manner restraining or coercing them in the exercise of said rights. . . ."

Respondents filed answers denying that they have disobeyed the decree.

After hearing oral arguments on the petition and answers, this Court entered an order of reference on January 3, 1967, appointing the Honorable Charles G. Neese, United States District Judge for the Eastern District of Tennessee, as Special Master to hear evidence and report to the Court whether respondents were in civil contempt for violating, disobeying and failing and refusing to comply with the Court's decree.

The Special Master filed a comprehensive report under date of December 5, 1967, containing detailed findings of fact to the effect that: the United Mine Workers of America and District 30 comprise the same legal entity;

that the named individual respondents were agents of the United Mine Workers of America; that Castle, Davis, Hobbs, Akers and Newberry committed various acts of misconduct which manifestly violated this Court's decree of May 20, 1960, and instigated such unlawful conduct on the part of other persons; that Beane, Castle, Davis and Hobbs had actual notice of this Court's 1960 decree and were personally bound thereby; that Akers and Newberry had constructive notice of the 1960 decree, but were not personally bound thereby; that Castle, Davis and Hobbs are liable in civil contempt for their own unlawful activities as well as for the acts of those persons whom they induced to act unlawfully; that Beane was officially responsible for the contumacious conduct of Castle, Davis, Hobbs, Akers and Newberry, and as such is guilty of disobedience and in contempt of this Court's decree; and that the United Mine Workers of America was responsible for the contumacious acts of Beane, Castle, Davis and Hobbs, as well as those of Akers and Newberry, and should be adjudged in civil contempt therefor. The Special Master recommended that said respondents, except Akers and Newberry, and each of them be adjudged in civil contempt of the decree of this Court and that they be required to purge themselves thereof.

Under date of December 21, 1967, the Board filed proposed corrections to certain details in the report of the Special Master not involving any material finding of fact. Under date of December 26, 1967, respondents filed objections to the report. Briefs have been filed by the Board in support of the report and by respondents in opposition thereto.

Upon consideration of the briefs and objections of the parties and the entire record, we conclude that the findings of fact contained in the report of the Special Master should be modified and corrected in the particulars set forth in the proposed corrections filed by the Board under date of December 21, 1967, and that said findings of fact, as modified and corrected, should be approved and confirmed in all respects. We hold that said findings of fact are supported by substantial evidence on the record considered as a whole. It is to be emphasized that this case does not involve permissible peaceful picketing, but to the contrary impermissible violent mass picketing, coercion of employees, unlawful acts, injuries to persons and damage to property, which were prohibited by the order of the Board enforced by the decree of this Court.

The following order will be entered:

The National Labor Relations Board having filed a petition to adjudge in civil contempt United Mine Workers of America, District 30 United Mine Workers of America and their agents C. E. Beane, Joseph Davis, Noble Hobbs, Walter Akers and J. D. Newberry in that said respondents failed and refused to comply with the decree of May 20, 1960; and respondents having filed their answers denying that they have disobeyed the decree; and United States District Judge Charles G. Neese having as Special Master rendered a report recommending that said respondents, except said Walter Akers and J. D. Newberry, and each of them be adjudged in civil contempt of the decree and that they be required to purge themselves thereof;

It is upon all the proceedings heretofore had herein ORDERED that the findings of fact set forth in the

report of the Special Master dated and filed December 5, 1967, be modified and corrected in the particulars set forth in the proposed corrections filed by the Board under date of December 21, 1967, and that said findings of fact, as modified and corrected, be and the same hereby are approved and confirmed in all respects.

It is further ORDERED that United Mine Workers of America, District 30, United Mine Workers of America, C. E. Beane, Joseph Castle, Joseph Davis and Noble Hobbs are hereby adjudged in civil contempt of the Court's above-mentioned decree.

It is further ORDERED that respondents, their officers, representatives, agents, successors and assigns shall forthwith purge themselves of such contempt by:

1. Ceasing and desisting from:

   (a) Restraining and coercing employees of Terry Elkhorn Mining Co., Inc., Mahan Coal Co., and Harry Wright Construction Company, Inc., or of any other employers engaged in coal mining operations or in processing, transporting or distributing coal within the geographical limits of the territorial jurisdiction of District 30, United Mine Workers of America, to wit—all of the Commonwealth of Kentucky east of a line drawn directly north and south from Louisville, Kentucky, excepting the counties of Pulaski, Wayne, McCreary, Whitley, Laurel, Knox, Bell, Marian, Clay, Owsley, Jackson, Harlan and Rockcastle and certain parts of Leslie County and Pike County—in the exercise of their rights guaranteed them by Section 7 of the National Labor Relations Act; by exerting force or committing acts of force or violence against said employees; injuring the person of said employees; damaging the property of said employees; threatening said employees by following them in superior numbers; using or threatening to use force or violence against said employees;

assaulting or attempting to assault said employees; threatening said employees with reprisals; barring said employees' ingress to and egress from their places of employment; preventing said employees physically from working; in any other manner restraining or coercing said employees in the exercise of said rights; and

(b) Violating in any other manner this Court's decree of May 20, 1960; provided, however, that this order shall not be construed as prohibiting lawful and peaceful picketing.

2. Taking the following affirmative action in purgation:

(a) Immediately post in conspicuous places, at District 30's business offices and meeting places in Pikeville and Hazard, Kentucky, and at all places where meetings of members of United Mine Workers of America Local Unions within said geographical limits and jurisdiction of District 30 are held and conducted, for a period of sixty (60) consecutive days, copies of an appropriate notice, with this order annexed, prepared by the Board and furnished to respondents, signed by an officer of the United Mine Workers of America and signed by each of the individual respondents, which states that the respondents have been adjudicated in civil contempt of Court for violating, disobeying, failing, and refusing to comply with the Court's said decree, and that they will undertake forthwith appropriate action in purgation, such notices and copy of this order to be maintained in clearly legible condition throughout such posting period, and insure that they are not altered, defaced or covered by any other material;

(b) Provide to each of said Local Unions for distribution to each of its members, copies of the signed notice, with this order annexed, as set forth in paragraph (a);

(c) Jointly and severally pay to petitioner as court costs all costs incurred in the investigation, prepara-

tion, presentation and final disposition of this proceeding to adjudge respondents in civil contempt, said amount to be fixed by further order of the Court upon service and submission by the Board of a statement of its costs; and

(d) File a sworn statement with the Regional Director of the Board's Ninth Region, within ten (10) days after the entry of the order of adjudication and again at the end of the sixty (60) day period provided in paragraph (a) above, showing what steps have been taken by respondents to comply with this order.

It is further ORDERED that to insure compliance with the foregoing provisions, upon a failure of United Mine Workers of America and District 30 United Mine Workers of America, or either of them, to purge themselves of contempt as herein provided, this Court hereby imposes a compliance fine of $25,000 and a further compliance fine of $1,000 per day on each of said respondents so long as such non-compliance continues; and in the event C. E. Beane, Joseph Castle, Joseph Davis or Noble Hobbs violates said decree or this order in the future, that each pay a fine of $5,000 or be confined to jail for a period of 30 days for each such violation.

Said compliance fines and penalties shall be imposed only in the event that respondents fail, after the entry of this order, to purge themselves of contempt as herein directed.

It is further ORDERED that in the event of future violations the Court will deal further with the matter by such other means as the Court shall then deem appropriate, including the issuance of a body attachment against any individual responsible for non-compliance or against any officer or agent responsible for non-compliance of the Union respondents.

APPENDIX C

FINAL JUDGMENT

Filed Apr. 18, 1968, Carl W. Reuss, Clerk

No. 14,226

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

UNITED MINE WORKERS OF AMERICA, and DISTRICT 30, UNITED MINE WORKERS OF AMERICA,
Respondents.

} ORDER

BEFORE: WEICK, Chief Judge, PHILLIPS and EDWARDS, Circuit Judges.

The National Labor Relations Board having filed a petition to adjudge in civil contempt United Mine Workers of America, District 30 United Mine Workers of America and their agents C. E. Beane, Joseph Davis, Noble Hobbs, Walter Akers and J. D. Newberry in that said respondents failed and refused to comply with the decree of May 20, 1960; and respondents having filed their answers denying that they have disobeyed the decree; and United States District Judge Charles G. Neese having as Special Master rendered a report recommending that said respondents, except said Walter Akers

and J. D. Newberry, and each of them be adjudged in civil contempt of the decree and that they be required to purge themselves thereof;

It is upon all the proceedings heretofore had herein ORDERED that the findings of fact set forth in the report of the Special Master dated and filed December 5, 1967, be modified and corrected in the particulars set forth in the proposed corrections filed by the Board under date of December 21, 1967, and that said findings of fact, as modified and corrected, be and the same hereby are approved and confirmed in all respects.

It is further ORDERED that United Mine Workers of America, District 30, United Mine Workers of America, C. E. Beane, Joseph Castle, Joseph Davis and Noble Hobbs are hereby adjudged in civil contempt of the Court's above-mentioned decree.

It is further ORDERED that respondents, their officers, representatives, agents, successors and assigns shall forthwith purge themselves of such contempt by:

1. Ceasing and desisting from:

   (a) Restraining and coercing employees of Terry Elkhorn Mining Co., Inc., Mahan Coal Co., and Harry Wright Construction Company, Inc., or of any other employers engaged in coal mining operations or in processing, transporting or distributing coal within the geographical limits of the territorial jurisdiction of District 30, United Mine Workers of America, to wit—all of the Commonwealth of Kentucky east of a line drawn directly north and south from Louisville, Kentucky, excepting the counties of Pulaski, Wayne, McCreary, Whitley, Laurel, Knox, Bell, Marian, Clay, Owsley, Jackson, Harlan and Rockcastle and certain parts of Leslie County and Pike County—in the exercise of their rights guaranteed them by Section 7 of the National Labor Relations

Act; by exerting force or committing acts of force or violence against said employees; injuring the person of said employees; damaging the property of said employees; threatening said employees by following them in superior numbers; using or threatening to use force or violence against said employees; assaulting or attempting to assault said employees; threatening said employees with reprisals; barring said employees' ingress to and egress from their places of employment; preventing said employees physically from working; in any other manner restraining or coercing said employees in the exercise of said rights; and

(b) Violating in any other manner this Court's decree of May 20, 1960; provided, however, that this order shall not be construed as prohibiting lawful and peaceful picketing.

2. Taking the following affirmative action in purgation:

(a) Immediately post in conspicuous places, at District 30's business offices and meeting places in Pikeville and Hazard, Kentucky, and at all places where meetings of members of United Mine Workers of America Local Unions within said geographical limits and jurisdiction of District 30 are held and conducted, for a period of sixty (60) consecutive days, copies of an appropriate notice, with this order annexed, prepared by the Board and furnished to respondents, signed by an officer of the United Mine Workers of America and signed by each of the individual respondents, which states that the respondents have been adjudicated in civil contempt of Court for violating, disobeying, failing, and refusing to comply with the Court's said decree, and that they will undertake forthwith appropriate action in purgation, such notices and copy of this order to be maintained in clearly legible condition throughout such posting period, and insure that they are not altered, defaced or covered by any other material;

(b) Provide to each of said Local Unions for distribution to each of its members, copies of the signed notice, with this order annexed, as set forth in paragraph (a);

(c) Jointly and severally pay to petitioner as court costs all costs incurred in the investigation, preparation, presentation and final disposition of this proceeding to adjudge respondents in civil contempt, said amount to be fixed by further order of the Court upon service and submission by the Board of a statement of its costs; and

(d) File a sworn statement with the Regional Director of the Board's Ninth Region, within ten (10) days after the entry of the order of adjudication and again at the end of the sixty (60) day period provided in paragraph (a) above, showing what steps have been taken by respondents to comply with this order.

It is further ORDERED that to insure compliance with the foregoing provisions, upon a failure of United Mine Workers of America and District 30 United Mine Workers of America, or either of them, to purge themselves of contempt as herein provided, this Court hereby imposes a compliance fine of $25,000 and a further compliance fine of $1,000 per day on each of said respondents so long as such non-compliance continues; and in the event C. E. Beane, Joseph Castle, Joseph Davis or Noble Hobbs violates said decree or this order in the future, that each pay a fine of $5,000 or be confined to jail for a period of 30 days for each such violation.

Said compliance fines and penalties shall be imposed only in the event that respondents fail, after the entry of this order, to purge themselves of contempt as herein directed.

It is further ORDERED that in the event of future violations the Court will deal further with the matter by such other means as the Court shall then deem appropriate, including the issuance of a body attachment against any individual responsible for non-compliance or against any officer or agent responsible for non-compliance of the Union respondents.

Entered by order of the Court.

CARL W. REUSS,
Clerk.

APPENDIX D

Decree of the United States Court of Appeals for the Sixth Circuit, Dated May 20, 1960

The pertinent provisions of the Decree of the United States Court of Appeals for the Sixth Circuit, dated May 20, 1960, as set forth in the Petition for Adjudication in Civil Contempt and Other Civil Relief (R. 4), filed by the NLRB and admitted by Petitioners (R. 9, 10), reads as follows:

* * * * *

"1. Shall not:

"B. Restrain and coerce employees . . . of any . . . employer engaged in coal mining operations or in processing, transporting and/or distributing coal within the geographical limits of the territorial jurisdiction of District 30, United Mine Workers of America . . . in the exercise of their rights guaranteed them by Section 7 of the Act, by engaging in and/or participating in conduct more fully described below:

"(a) Exerting force or committing acts of force and violence against said employees, injuring the person or damaging the property of said employees, threatening said employees by following them in superior numbers, using or threatening to use force or violence against said employees, assaulting employees, attempting to assault employees, threatening them with reprisals, barring their ingress to and egress from their places of employment, preventing them physically from working or in any other manner restraining or coercing them in the exercise of said rights."

* * * * *

APPENDIX E

ORDERS OF THE SIXTH CIRCUIT

Filed October 7, 1966

No. 14,226

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner* vs: UNITED MINE WORKERS OF AMERICA, AND DISTRICT 30, UNITED MINE WORKERS OF AMERICA, *Respondents*	ORDER On Motion to Dismiss Petition for Adjudication In Civil Contempt

Before WEICK, Chief Judge, PHILLIPS and EDWARDS, Circuit Judges.

The decree of this Court entered on May 20, 1960, enforces a broad order of the Board, but the Union consented to it. A similar order of the Board was upheld by the Supreme Court in *NLRB* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318.

The petition for an adjudication in civil contempt alleges conduct on the part of the Respondents which, if true, was proscribed by the Board's order.

The motion to discharge and vacate is therefore denied and the Respondents are hereby ordered to make answer to said petition in the manner heretofore ordered by this

Court in the Order to Show Cause, on or before November 1, 1966.

Entered by order of the Court.

CARL W. REUSS
Clerk

No. 14,226

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner* v. UNITED MINE WORKERS OF AMERICA, AND DISTRICT 30, UNITED MINE WORKERS OF AMERICA, *Respondents*	ORDER OF REFERENCE

Before WEICK, Chief Judge, and PHILLIPS and EDWARDS, Circuit Judges.

Under date of May 20, 1960, this Court entered a consent decree enforcing an order of the National Labor Relations Board issued February 10, 1960. The decree directed that respondents, United Mine Workers of America, and District 30, United Mine *Works* of America, and their officers, agents, representatives, successors and assigns, abide by and perform the directions of the Board contained in said order.

Said order directed that respondents:

"Shall not:

"B. Restrain and coerce employees . . . of any . . . employer engaged in coal mining operations or in processing, transporting and/or distributing coal within the geographical limits of the territorial jurisdiction of District 30, United Mine Workers of America . . . in the exercise of their rights guaranteed them by Section 7 of the Act, by engaging in and or participating in conduct more fully described below:

"(a) Exerting force or committing acts of force and violence against said employees, injuring the person or damaging the property of said employees, threatening said employees by following them in superior numbers, using or threatening to use force or violence against said employees, assaulting employees, attempting to assault employees, threatening them with reprisals, barring their ingress to and egress from their places of employment, preventing them physically from working or in any other manner restraining or coercing them in the exercise of said rights."

Under date of July 8, 1966, the Board filed a Petition for Adjudication in Civil Contempt and for Other Civil Relief against respondents, their officers and agents, particularly J. D. Newberry, C. E. Beane, Joseph Castle, Joseph Davis, Noble Hobbs and Walter Akers, charging them with violating, disobeying and failing and refusing to comply with the aforesaid decree of this Court. Said petition charges respondents with acts of force, violence, intimidation, threats, property damage and assaults resulting in personal injury, in violation of the aforesaid decree of this Court, as follows:

"The UMWA and District 30, their officers and agents, including Beane, Castle, Davis, Hobbs, Akers and Newberry, have violated, disobeyed and failed and refused to comply with and continue to violate

and disobey and fail and refuse to comply with the said decree of this Court, in that at the times hereinafter alleged and within the geographical limits of District 30's territorial jurisdiction they have, committed acts of violence upon, physically assaulted and threatened with violence employees of Terry Elkhorn Mining Company, Inc., employees of M. C. Mahan d/b/a Mahan Coal Company and employees of Harry Wright Construction Company, Inc.—all of said employees being then engaged in processing, transporting and distributing coal within the geographical limits of District 30's territorial jurisdiction—causing physical injury to said employees and inflicting considerable property damage, and have followed said employees in superior numbers and attempted to and did bar the said employees' ingress to and egress from their places of employment, and attempted to and did physically prevent said employees from working and thereby and otherwise in like and related manner have in violation of said decree, restrained and coerced the said employees in the exercise of rights guaranteed by Section 7 of the National Labor Relations Act, as amended; more particularly, petitioner shows as follows:

"A. On or about March 31, 1966, the UMWA and District 30, by approximately 200 to 300 of their officers, agents and members, including and in the presence of respondents Castle and Newberry, massed at the bridge near the intersection of U.S. Route 23 and the road leading to Auxier in Floyd County, Kentucky, parked automobiles across the private access road leading from the Auxier road to the tipple operated at Auxier by Mahan Coal Company and attempted to and did block the entrance to the tipple and otherwise by show of force, violence and intimidation, including threats of violence, did prevent employees including employees of Mahan Coal Company and employees of Terry Elkhorn Mining Company from entering or leaving the tipple. Between 40 and 75 union pickets, led by

respondents Castle and Newberry, went onto the tipple property and ordered M. C. Mahan and his employees to stop working and to shut down operations and otherwise by massed numbers, threats of bodily harm and show of force caused the shutting down of said tipple operation. Thereafter, between 40 and 50 union pickets, led by respondents Castle and Newberry, entered the Lick Branch mine property near Prestonsburg in Floyd County, Kentucky operated by Terry Elkhorn Mining Company and in like manner by massed numbers, threats, show of force and intimidation did forcibly prevent the employees of Terry Elkhorn Mining Company from continuing to work.

"B. On or about April 4, 1966, on and about said tipple property, the UMWA and District 30, by about 150 to 200 officers, agents and members, including and in the presence of respondents Castle, Davis, Hobbs, Akers and Newberry, surrounded trucks driven by employees of Harry Wright Construction Company which were attempting to unload; and demanded that the trucks stop hauling, threatening M. C. Mahan and said employees with physical injury and death if the tipple was not shut down and work ceased; and attempted to and did cause damage to said trucks by breaking off rearview mirrors and scattering nails on the loading site which resulted in flat tires to the trucks; and did by massed numbers, threats, show of force and other intimidation cause the shutting down of said tipple operation.

"C. On or about April 6, 1966, the UMWA and District 30, by about 400 officers, agents and members including and in the presence of respondents Castle, Davis, Hobbs, Akers, and Newberry, massed at said bridge and on or about said tipple property, carrying and displaying heavy clubs, knives, bats, belts and guns, and other wise by show of force, violence, intimidation and threats, attempted to and

did cause the operations at the tipple to be shut down. After the tipple operations were shut down, said officers, agents and members went to the entrance to the Lick Branch Mine and massed at said entrance, throwing rocks and other lethal objects at trucks driven by the employees of Terry Elkhorn Mining Co. and the employees of Harry Wright Construction Co. causing extensive property damage to said trucks and otherwise by show of force, violence and intimidation attempted to prevent said employees from the free ingress to and egress from the Lick Branch Mine. Thereafter, about 100 of said officers, agents and members, accompanied and led by respondent Castle went into the Sun Valley Tipple property operated by Terry Elkhorn Mining Co. in Johnson County, Kentucky, and threatened extensive property damage to said tipple and bodily harm to the employees working at said tipple if the operations were not shut down and by said threats, show of force, violence and intimidation attempted to prevent said employees from continuing to work.

"D. On or about April 7, 1966, the UMWA and District 30, by approximately 100 pickets, including and in the presence of respondents Castle and Newberry, massed at the entrance to the Lick Branch Mine and at the entrance to the Auxier tipple, throwing rocks and other lethal objects at and spreading nails in front of trucks operated by said employees, causing extensive property damage to said trucks and by show of force, threats, violence and intimidation did attempt to cause the mining and tipple operations to be shut down.

"E. On or about April 8, 1966, the UMWA and District 30, by approximately 200 officers, agents and members, including respondents Beane, Castle, Davis, Hobbs, Akers, and Newberry, massed at the entrance to the Lick Branch Mine and the entrance to the Auxier tipple, surrounding, barraging with

rocks and other lethal objects and spreading nails in front of trucks operated by said employees, causing extensive property damage to said trucks.

"F. On or about April 11, 1966, the UMWA and District 30, by about 200 officers, agents and members on or about the entrance to the Lick Branch Mine, caused extensive property damage to trucks and severe personal injury to employees Henry E. Strickland and William A. Rice by throwing rocks and other lethal objects which struck with force said trucks and said employees.

"G. On or about April 19, 1966, the UMWA and District 30, by about 25 of its officers, agents and members at the entrance to the Lick Branch Mine surrounded the truck driven by Harry Wright, throwing rocks and shooting steel ball bearings with slingshots, and caused extensive property damage to said truck and severe personal injury to said Harry Wright.

"H. On or about April 26, 1966, the UMWA and District 30, by approximately 15 officers, agents and members, including and in the presence of respondent Newberry, at the Pure Oil filling station on U.S. Route 23 between Auxier and Prestonsburg, attacked employee James Ratliff who was changing a flat tire on his truck and severely beat him about his head and stomach with a steel pipe, severely injuring his person, and attacked his truck with a sledge hammer and other lethal objects causing extensive property damage to said truck.

"I. From on or about March 31, 1966 to on or about May 10, 1966, the UMWA and District 30 by between 50 and 500 of its officers, agents and members massed at the entrance to the Lick Branch Mine on almost every working day and by show of force, violence, threats and intimidation attempted to and did coerce employees in the exercise of their rights to employment and attempted to force Terry

Elkhorn Mining Company to cease doing business at that location.

"J. From on or about March 31, 1966, to on or about June 6, 1966, the UMWA and District 30 by between 50 and 500 officers, agents and members did mass on and about the Auxier tipple premises did threaten to take any means to shut down said tipple operations, and by show of force, violence and intimidation did cause said operations to be shut down for over seventy-five percent of said period and otherwise attempted to and did coerce employees in the exercise of their rights to employment, and said tipple operations were permanently ceased after May 17, 1966 due to the fact that the tipple property was almost totally destroyed by dynamite or other explosives on or about May 17, May 19 and June 6, 1966."

Under date of July 20, 1966, this Court entered a show cause order against respondents.

Under date of October 7, 1966, this Court entered an order denying respondents' motion to discharge and to vacate the show cause order and to dismiss the Board's petition, and directed that respondents answer the show cause order.

Under date of November 7, 1966, respondents filed an answer denying various factual averments contained in the petition of the Board.

Under date of December 2, 1966, the Board filed a motion for the appointment of a special master and a motion to strike portions of the answer of respondents, which motion was opposed by respondents.

Oral arguments on the petition, answer and the various motions were heard by this Court on December 8, 1966.

Respondents deny that they have disobeyed the decree of this Court. This presents an issue of fact which must be resolved before this Court can act upon the Board's Petition for Adjudication in Civil Contempt.

The Court therefore finds that it is appropriate to designate a Special Master to determine the issues of fact.

It is therefore ORDERED that the Honorable Charles G. Neese, District Judge for the United States District Court for the Eastern District of Tennessee, at Greeneville, Tennessee, be and hereby is appointed Special Master to take testimony and hear evidence relative to the issues of fact hereinabove set forth, and as raised by the petition of the Board, and as denied by respondents; and that the clerk of this Court shall forthwith furnish the Master with a copy of this order. Since the Special Master is a United States District Judge, his oath as District Judge is accepted as his oath as Special Master.

It is further ORDERED that the Master shall have authority, powers and duties as follows:

(a) To hold such hearings as may be reasonably necessary to obtain oral or documentary evidence from witnesses made available by the parties, or under the compelling process of the Master. Such hearings may be held at such place or places as the Master may deem appropriate.

(b) To engage a qualified reporter to take and transcribe the testimony adduced at such hearings. Pending further order of this Court with respect to taxation and assessment of costs, the reporter's charges, when duly billed for, and approved by the Master, shall be paid by the Board, in the first instance.

(c) In accordance with the Federal Rules of Civil

Procedure, to regulate all proceedings in the hearings before him and to do all acts and take all measures necessary or proper for the performance of his duties under this order. He may issue subpoenas to compel the attendance of witnesses and may require the production before him of admissible evidence upon all matters relevant and material to the issues, including the production of books, papers, documents and records. The Master may rule upon the admissibility of evidence, subject to review by this Court upon his report. He may put witnesses on oath and may himself examine them. At the request of either party, he shall make a record of evidence offered and excluded, for review by this Court upon his report.

(d) As soon after the conclusion of the hearings as practicable, the Master shall file with the Clerk of this Court the transcript of the proceedings and of the evidence, and the original exhibits, together with his report thereon and his recommendations as to findings of fact and recommendations as to conclusions of law; a copy of said report and recommendations shall at the same time be served upon the parties. The Master may require the parties to submit, prior to the filing of his report, proposed findings, objections to proposed findings, and briefs, and it is further ORDERED that

(e) Final assessment and allocation of all costs, fees, and expenses involved, including counsel fees, are reserved for further order of the Court.

(f) Upon the filing with the Clerk of the Court of the Master's report and recommendations, the transcript of the proceedings and the original exhibits, the Clerk shall forthwith mail to all parties notice thereof. Within twenty (20) days after such notice, any party may file with this Court and serve upon the other parties

written objections thereto. Within thirty (30) days after the filing of the Master's report and recommendations, and the transcript and exhibits, the petitioner may serve and file a brief. Respondents may file a brief within twenty (20) days after petitioner has filed its brief; and petitioner may file a reply brief within ten (10) days thereafter. This Court will then consider any requests for oral argument.

Action is reserved on the motion of the Board to strike portions of the answer of respondents. All other matters are reserved pending the filing of the report of the Special Master.

Entered by order of the Court.

CARL W. REUSS,
Clerk.

APPENDIX F

STATUTES

18 USCA 401:

"A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

"(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

"(2) Misbehavior of any of its officers in their official transactions;

"(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

Labor Management Relations Act, 1947 [29 USCA]:

Section 6 [29 USCA 106]:

"No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

Section 8(b)(1)(A) [29 USCA 158(b)(1)(A)]:

"b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section

157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . ."

Section 8(b)(7) [29 USCA 158(b) (7)]:

"(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:"

Section 10(e) [29 USCA 160(e)]:

"(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree en-

forcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28."

Section 10(f) [29 USCA 160(f)]:

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside . . Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like

manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

Section 10(h) [29 USCA 160(h)]:

"(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by sections 101-115 of this title."

Federal Rules of Civil Procedure:

Rule 52(a):

"(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memo-

randum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. . . ."

Rule 53(e)(2):

"(2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application of the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

Rule 65(d):

"(d) FORM AND SCOPE OF INJUNCTION OR RESTRAINING ORDER. Every order granting an injunction and restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 14 1968
JOHN F. DAVIS, CLERK

No. 292

In the Supreme Court of the United States

OCTOBER TERM, 1968

UNITED MINE WORKERS OF AMERICA, DISTRICT 30, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
JOHN I. TAYLOR,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Argument	6
Conclusion	12

CITATIONS

Cases:

Amalgamated Utility Workers v. *Consolidated Edison Co.*, 309 U.S. 261	8
Anderson v. *Mt. Clemens Pottery Co.*, 328 U.S. 680	6
Division 1287, Amalgamated Bus Employees v. *Missouri*, 374 U.S. 74	11
Gompers v. *Bucks Stove & Range Co.*, 221 U.S. 418	8
Graver Mfg. Co. v. *Linde Co.*, 336 U.S. 271	8
International Ladies' Garment Workers' Union v. *National Labor Relations Board*, 237 F. 2d 545	7
Kansas City Power & Light Co. v. *National Labor Relations Board*, 137 F. 2d 77	6
Local 74, United Brotherhood of Carpenters v. *National Labor Relations Board*, 341 U.S. 707	11
McComb v. *Jacksonville Paper Co.*, 336 U.S. 187	10

316-372—68

Cases—Continued

	Page
Madden v. *Grain Elevator, Flour and Feed Mill Workers, ILA, Local 418*, 334 F. 2d 1014, certiorari denied, 379 U.S. 967	7
National Labor Relations Board v. *District 30, et al.*, 163 NLRB No. 81	9
National Labor Relations Board v. *Hopwood Relinning Co.*, 104 F. 2d 302	8
National Labor Relations Board v. *Local 5881, United Mine Workers of America*, 323 F. 2d 853	6
National Labor Relations Board v. *Mexia Textile Mills*, 339 U.S. 563	10
National Labor Relations Board v. *Mooney Aircraft, Inc.*, 61 LRRM 2163, January 17, 1966 (not officially reported)	10
National Labor Relations Board v. *Pool Mfg. Co.*, 339 U.S. 577	10
National Labor Relations Board v. *Reed & Prince Mfg. Co.*, 196 F. 2d 755	9
National Labor Relations Board v. *Spartanburg Sportswear Company*, 278 F. 2d 312	6
National Labor Relations Board v. *Warren Co.*, 350 U.S. 107	8
Olson Rug Company v. *National Labor Relations Board*, 304 F. 2d 710	6
Penfield Co. v. *Securities & Exchange Commission*, 330 U.S. 585	11
Shillitani v. *United States*, 384 U.S. 364	11
Thompson Products v. *National Labor Relations Board*, 133 F. 2d 637	10
Tosh v. *West Kentucky Coal Co.*, 252 Fed. 44	9
United Brotherhood of Carpenters v. *United States*, 330 U.S. 395	7
United Mine Workers v. *Gibbs*, 383 U.S. 715	7
United Mine Workers of America v. *Patton*, 211 F. 2d 742	7

Cases—Continued

	Page
United States v. *United Mine Workers of America*, 190 F. 2d 865	10
Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474	8
Statutes and Rules:	
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), Section 2(13)	6–7
Norris-LaGuardia Act, Section 6, 29 U.S.C. 106	6
Federal Rules of Civil Procedure, Rule 53(e)(2)	6
Miscellaneous:	
H. Conf. Rep. No. 510 on H.R. 3020, 80th Cong., 1st Sess. 36; 1 Leg. Hist. of the LMRA 540	7

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 292

UNITED MINE WORKERS OF AMERICA, DISTRICT 30, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 23a–29a) adjudging petitioners in contempt of its earlier decree is reported at 393 F. 2d 265. The report of the special master (Pet. 1a–22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 1968 (Pet. 30a–34a). The petition for a writ of certiorari was filed on July 15, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals applied the proper standard of review in affirming the special master's findings of fact.

2. Whether, in a contempt proceeding involving a decree enforcing an order of the National Labor Relations Board, Section 2(13) of the National Labor Relations Act provides the applicable evidentiary standard for determining a union's responsibility for the acts of its officers and members.

3. Whether the civil contempt adjudication was otherwise proper.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), and the Norris-LaGuardia Act (29 U.S.C. 101, *et seq.*), are set forth in the petition at pp. 47a–51a.

STATEMENT

On May 20, 1960, the court of appeals, pursuant to a settlement stipulation, entered a decree (Pet. 35a) enforcing in full an order of the Board. The court's decree provided that petitioner labor organizations and their officers and agents (Pet. 35a):

> 1. Shall not:
>
> * * * * *
>
> B. Restrain and coerce employees * * * of any * * * employer engaged in coal mining operations * * * within the geographical limits of the territorial jurisdiction of District 30, United Mine Workers of America * * * in the exercise

of their rights guaranteed them by Section 7 of the Act, by engaging in and/or participating in conduct more fully described below:

(a) Exerting force or committing acts of force and violence against said employees, injuring the person or damaging the property of said employees, threatening said employees by following them in superior numbers, using or threatening to use force or violence against said employees, assaulting employees, attempting to assault employees, threatening them with reprisals, barring their ingress to and egress from their places of employment, preventing them physically from working or in any other manner restraining or coercing them in the exercise of [their rights guaranteed by Section 7 of the Act].

On July 8, 1966, the Board filed a petition with the court of appeals, requesting that petitioner labor organizations and certain of their officers and agents be adjudged in civil contempt for disobeying the prior decree. The relevant facts establishing the contempt are set forth in detail in the report of the special master appointed by the court of appeals (United States District Judge Neese), which is set forth as an appendix to the petition (Pet. 1a–22a).

In general, the alleged contempt related to attempts by the petitioners to coerce and intimidate employees of Terry Elkorn Mining Company, Inc., Mahan Coal Company and Harry Wright Construction Company, Inc., during the course of an organizational campaign. Typical of many instances of coercion and intimidation was that which occurred on March 31, 1966, at one of Elkorn's premises when

one of the union pickets, who had accompanied petitioner Hobbs to the site, stated that Elkorn "would be organized even if it took bloodshed" (SMR 10, Tr. 376).[1] That this was no empty threat of the Union became clear from events that followed. On April 8 at one of Elkorn's plants, petitioner Castle was one of a group of pickets who threw stones at a Wright Construction Company truck (SMR 15, Tr. 154, 168). A similar rock-throwing incident on April 11th resulted in two people in a truck being injured by shattered glass; one of these men required surgery to remove glass particles from his eye (SMR 16, Tr. 401). On April 19th when a truck driver was struck by rocks and knocked to the ground, a picket, holding a union membership card, approached him saying, "Now, God damn you, will you sign one now" (SMR 18; Tr. 160–161). On another occasion pickets dragged a truck driver from his truck, hit him over the head with a 10-inch pipe and battered the truck with a sledge hammer and a tire tool, smashing the windshield and knocking a hole in the door (SMR 16–17; Tr. 188–189, 193–194, 284–285). On May 20 Elkorn's employees found that a coal crusher and some other equipment had been damaged by an explosion and fire. A week later a second explosion did substantial damage to the crusher (SMR 23; Tr. 264–276). In addition, on several occasions throughout the period from March 31st to the middle of May the Union employed mass picketing tactics, at one time having as many as 400 pickets at a single site

[1] "SMR" refers to the special master's report and "Tr." to the transcript of testimony before the special master.

(SMR 14; Tr. 156; see also Tr. 49–51, 152–154, 217–218, 222, 544–552).

After hearing extensive testimony, the special master concluded that petitioners United Mine Workers and its District 30 local comprised a single legal entity; that petitioners Beane, Castle, Davis and Hobbs were agents of the Union; and that they had actual notice of the earlier decree (Pet. 19a, 4a). He further concluded that there was "clear and convincing evidence" (Pet. 16a) that petitioners had violated the prior decree of the court of appeals by (Pet. 15a):

> * * * committing acts of violence upon, physically assaulting and threatening with violence employees of Elkhorn, the Wright Company and Mr. Mahan; causing physical injury to some of the said employees; inflicting considerable damage to properties of the aforenamed employers; following the said employees in superior numbers; attempting to bar and barring the ingress to and egress from such employees' places of employment; attempting to and physically preventing such employees' working; and, by restraining and coercing such employees in the exercise of rights guaranteed them by 29 U.S.C. § 157.

The court of appeals, with minor modifications, approved the special master's report, holding that his "findings of fact are supported by substantial evidence on the record considered as a whole" (Pet. 26a). Accordingly, the court ruled that petitioners had committed civil contempt and issued an order requiring

them to purge themselves and providing for fines and other penalties if they failed to do so (Pet. 27a, 30a–34a).

ARGUMENT

1. Contrary to petitioners' contention (Pet. 23–24) the court below applied the correct standard of review in affirming the special master's findings of fact. The burden is on the Board in civil contempt proceedings to prove the alleged contumacious conduct by presenting "clear and convincing evidence" to the trier of fact. See *Kansas City Power & Light Co.* v. *National Labor Relations Board*, 137 F. 2d 77, 79 (C.A. 8); *National Labor Relations Board* v. *Local 5881, United Mine Workers of America*, 323 F. 2d 853, 854 (C.A. 6). Here, the special master found that the Board had satisfied that test (Pet. 16a–17a). Although petitioners contend that the court below should have applied the same standard in reviewing the special master's findings of fact, it is well settled that the findings of the special master are to be accepted if "supported by substantial evidence and are not clearly erroneous." *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 689; accord, *Olson Rug Company* v. *National Labor Relations Board*, 304 F. 2d 710, 712 (C.A. 7); *National Labor Relations Board* v. *Spartanburg Sportswear Company*, 278 F. 2d 312, 313 (C.A. 4); Rule 53(e)(2) of the Federal Rules of Civil Procedure. The court below properly applied that standard here (Pet. 26a).

2. Petitioners also err in contending (Pet. 26–30) that Section 6 of the Norris-LaGuardia Act (29 U.S.C. 106; Pet. 47a), rather than Section 2(13) of

the National Labor Relations Act,[2] provides the applicable evidentiary standard for establishing the liability of a union and its officers for the actions of other individuals. As this Court noted in *United Mine Workers* v. *Gibbs,* 383 U.S. 715, 736, Congress, in enacting Section 2(13) as part of the 1947 amendments to the Labor Act, expressly provided that "the responsibility of a union for the acts of its members and officers is to be measured by reference to ordinary doctrines of agency, rather than the more stringent standards of § 6" (footnote omitted). Accord: *Madden* v. *Grain Elevator, Flour and Feed Mill Workers, ILA, Local 418,* 334 F. 2d 1014, 1021 (C.A. 7), certiorari denied, 379 U.S. 967; *International Ladies' Garment Workers' Union* v. *National Labor Relations Board,* 237 F. 2d 545, 551 (C.A.D.C.); *United Mine Workers of America* v. *Patton,* 211 F. 2d 742, 748 (C.A. 4).[3] This unanimous view of the courts is fully supported by the legislative history. See H. Conf. Rep. No. 510 on H.R. 3020, 80th Cong., 1st Sess., 36; 1 Leg. Hist. of the LMRA 540.

Petitioners cannot avoid the import of these cases and the legislative history on the ground that a Board contempt proceeding does not arise under the Labor

---

[2] Section 2(13) provides that:

> In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

[3] *United Brotherhood of Carpenters* v. *United States,* 330 U.S. 395, relied on by petitioners (Pet. 27), was decided prior to the 1947 amendments to the Labor Act.

Act. As this Court emphasized in *National Labor Relations Board* v. *Warren Co.*, 350 U.S. 107, 112–113:

> [The Labor] Act contemplates cooperation between the Board and the Courts of Appeals both at the enforcement and the contempt stages in order to effectuate its purposes. * * * The decree, like the order it enforces, is aimed at the prevention of unfair labor practices, an objective of the Act, and so long as compliance is not forthcoming that objective is frustrated. It is for this reason that Congress gave the judicial remedy of contempt as the ultimate sanction to secure compliance with Board orders. The granting or withholding of such remedial action is not wholly discretionary with the court. [Footnotes omitted.][4]

3. Petitioners also contend (Pet. 30–35) that contempt proceedings were inappropriate because the acts of violence and coercion occurring in 1966 were unrelated to the conduct which led to the 1960 decree. The special master found, however, that the conduct of the union did violate the 1960 decree and this finding was sustained by the court below (Pet. 20a–21a). Accordingly, this contention presents merely an evidentiary issue, which does not warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490–491; *Gravet Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275. In any event, the 1960 decree (Pet. 35a) prohibited the union and its officers

[4] Accord, *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 445–446; *National Labor Relations Board* v. *Hopwood Retinning Co.*, 104 F. 2d 302, 305 (C.A. 2); see also, *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 269.

and agents from engaging in the exact conduct that they were found to have resumed in the instant proceeding.[5] *Tosh* v. *West Kentucky Coal Co.*, 252 Fed. 44 (C.A. 6), is not in conflict. There, the contempt proceedings were dismissed because "[t]here was no evidence on the trial that the defendants in the [prior] injunction suit had anything to do with [the conduct upon which the contempt proceedings are based] * * * or that [the alleged contemnors] had at any time any actual relations with the real defendants in the injunction suit." *Id.*, at 50. Equally inapplicable is *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 196 F. 2d 755 (C.A. 1), where the court declined to entertain contempt proceedings "in view of the fact that the Board has already instituted and completed a new unfair labor practice proceeding" involving the identical conduct by the Company. *Id.*, at 760.[6]

---

[5] It is irrelevant that Elkhorn did not begin its business until after the 1960 decree issued, and that neither Elkhorn nor the other employers affected by the Union's 1966 activity had filed the original charges in 1960 (Pet. 31). The 1960 decree barred the Union from restraining the employees of any employer engaged in coal mining and related operations within the territorial jurisdiction of District 30. Elkhorn, Mahan, and Wright were in this category.

[6] As petitioners correctly point out, certain aspects of their 1966 conduct led to an unfair labor practice proceeding based on charges that the Union had engaged in recognitional picketing in violation of Section 8(b)(7)(C) of the Act. (The Board's Decision and Order in that proceeding (163 NLRB No. 81) is now before the court below for enforcement. *National Labor Relations Board* v. *District 30, et al.*, No. 18383 (C.A. 6)). However, the 1966 activity also involved restraint and coercion in violation of Section 8(b)(1)(A), which was the subject of the

4. Petitioners contend that, even if the picketing and acts of violence were contemptuous of the court's decree, the court could not adjudge them in contempt because those acts had ceased before the Board had filed its petition with the court (Pet. 35–37). While a cessation of contumacious conduct may be a factor which might mitigate the sanctions to be imposed, the remedy of contempt would be substantially impaired if respondents could so easily avoid the impact of a remedial decree. See *National Labor Relations Board* v. *Mooney Aircraft, Inc.*, 61 LRRM 2163, 2164 (C.A. 5), January 17, 1966; cf. *National Labor Relations Board* v. *Mexia Textile Mills*, 339 U.S. 563, 567–568; *National Labor Relations Board* v. *Pool Mfg. Co.*, 339 U.S. 577, 581–582.[7]

1960 decree. In such circumstances, it was proper for the Board to pursue both contempt and unfair labor practice proceedings. See *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 194–195; *Thompson Products* v. *National Labor Relations Board*, 138 F. 2d 637 (C.A. 6).

[7] *United States* v. *United Mine Workers of America*, 190 F. 2d 865 (C.A.D.C.), which turns on its special facts, is distinguishable. There, the restraining order directed the union to cease its strike and to instruct its members to return to work. When the strike and refusal to work continued, contempt proceedings were initiated. While the contempt proceedings were pending, the labor dispute was settled, the employees returned to work, and the national emergency came to an end; accordingly the court concluded there was no longer any necessity for civil contempt sanctions. *Id.*, at 872. In contrast, here, although petitioners were ordered to cease and desist from their illegal conduct and did for several years, they thereafter resumed the same type of conduct. Moreover, although they again ceased the activity when contempt proceedings became imminent, there was no showing that the underlying labor dispute had been resolved.

5. Petitioners also contend (Pet. 38–40) that the imposition of conditional fines and the setting of terms of imprisonment to be imposed for future violations of the order is inconsistent with the remedial nature of civil contempt proceedings. Since these fines and penalties are only to be imposed in the event that petitioners should fail to purge themselves as directed (Pet. 33a), they constituted appropriate sanctions in civil contempt proceedings. See *Penfield Co.* v. *Securities & Exchange Commission,* 330 U.S. 585, 590–591; *Shillitani* v. *United States,* 384 U.S. 364, 368–372.[8]

In such circumstances, it was reasonable for the court to conclude that a contempt sanction was still warranted. See *Local 74, United Brotherhood of Carpenters* v. *National Labor Relations Board,* 341 U.S. 707, 715; *Division 1287, Amalgamated Bus Employees* v. *Missouri,* 374 U.S. 74, 77–78.

[8] Finally, there is no merit to petitioners' assertion (Pet. 39–40) that the order of the court below unduly expands the scope of the Board's original order, as enforced by the court in 1960. Both orders only require petitioners to cease and desist from restraining and coercing employees of any employers engaged in coal mining operations within the territorial jurisdiction of District 30, United Mine Workers of America (Pet. 27a, 35a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
JOHN I. TAYLOR,
Attorney,
National Labor Relations Board.

AUGUST 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968

SUPREME COURT, U. S.
Office-Supreme Court, U.S.
FILED
SEP
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 292

UNITED MINE WORKERS OF AMERICA, DISTRICT 30, UNITED MINE WORKERS OF AMERICA, C. E. BEANE, JOSEPH CASTLE, JOSEPH DAVIS and NOBLE HOBBS,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY TO OPPOSITION BRIEF

EDWARD L. CAREY
HARRISON COMBS
WILLARD OWENS
900 Fifteenth Street, N.W.
Washington, D. C.

H. B. NOBLE
304 Main Street
Hazard, Kentucky

M. E. BOIARSKY
511 Kanawha Valley Building
Charleston, West Virginia

Counsel for Petitioners

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

INDEX

TABLE OF CONTENTS

	Page
FOREWORD	1
UMW'S REPLY TO NLRB'S STATEMENT OF QUESTIONS PRESENTED	1
UMW'S RESPONSE TO NLRB'S STATEMENT	2
ARGUMENT	3
UMW's Reply to NLRB's Argument 1.	3
UMW's Reply to NLRB's Argument 2.	4
UMW's Reply to NLRB's Argument 3.	7
UMW's Reply to NLRB's Argument 4.	8
UMW's Reply to NLRB's Argument 5.	10
CONCLUSION	11

TABLE OF CASES

A. H. Bull Steamship Co. v. *Seafarers' International Union, etc.*, 2 Cir., 250 F.2d 326, 330, cert. den. 355 U.S. 932	4
Amal. Utility Workers v. *Consolidated Edison Co.*, 309 U.S. 261, 269	6-7
Division 1287, Amal. Bus Employees v. *Missouri*, 374 U.S. 74, 77-78	10
Gompers v. *Buck's Stove & Range Co.*, 221 U.S. 418, 441, 444, 445-46	6, 8, 10
Graver Mfg. Co. v. *Linde Co.*, 336 U.S. 271, 275	9
International Ladies' Garment Workers Union v. *NLRB*, D. C. Cir., 237 F.2d 545, 551, 552	5
Local 74, Carpenters v. *NLRB*, 341 U.S. 707, 715	10

Page

Madden v. *Grain Elevator, Flour & Feed Mill Workers, ILA, Local 418*, 7 Cir., 334 F.2d 1014, cert. den. 379 U.S. 967 6

McComb v. *Jacksonville Paper Co.*, 336 U.S. 187, 194-95 8

NLRB v. *Hopwood Retinning Co.*, 2 Cir., 104 F.2d 302, 305 6

NLRB v. *Mexia Textile Mills*, 339 U.S. 563, 567-68 9

NLRB v. *Mooney Aircraft, Inc.*, 5 Cir., 61 LRRM 2163, 2164 8

NLRB v. *New York Merchandise Co., Inc.*, 2 Cir., 134 F.2d 949, 953 8

NLRB v. *Pacific Greyhound Lines*, 9 Cir., 106 F.2d 867 8

NLRB v. *Pool Mfg. Co.*, 339 U.S. 577, 581-82 9

NLRB v. *Reed & Prince Mfg. Co.*, 1 Cir., 196 F.2d 755, 760 8

NLRB v. *Warren Co.*, 350 U.S. 107, 110, 112-13 ..... 4, 6

Penfield Co. v. *Securities & Exchange Commission*, 330 U.S. 585, 590-91 10

Polites v. *U. S.*, 364 U.S. 426, 433, fn. 9 6

Shillitani v. *U. S.*, 384 U.S. 364, 368-72 10

System Federation No. 91 v. *Wright*, 364 U.S. 642, 651 7

Thompson Products v. *NLRB*, 6 Cir., 133 F.2d 637 8

Tosh v. *West Kentucky Coal Co.*, 6 Cir., 252 Fed. 44 ..... 7, 8

UMWA v. *Patton*, 4 Cir., 211 F.2d 742, 748, 750 ..... 5, 6

U. S. v. *General Motors Corporation*, 384 U.S. 127 3

U. S. v. *UMWA*, D. C. Cir., 190 F.2d 865 9

Universal Camera Corp. v. *NLRB*, 340 U.S. 474, 490-91 9

STATUTES

Page

Labor Management Relations Act, 1947:
Section 2(13) [29 USCA 152(13)] 4, 5
Section 7 [29 USCA 157] 9
Section 8(b)(1)(A) [29 USCA 158(b)(1)(A)] 8
Section 8(b)(7) [29 USCA 158(b)(7)] 8
Section 10 [29 USCA 160] 6, 9
Section 10(e) [29 USCA 160(e)] 5
Section 10(f) [29 USCA 160(f)] 5
Section 303 [29 USCA 187] 5
Norris-LaGuardia Act [29 USCA 106] 6
Section 6 [29 USCA 106] 3, 4, 6

MISCELLANEOUS

1 Legislative History of the Labor Management Relations Act, 1947 (Government Printing Office), pp. 77-78, 540 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 292

UNITED MINE WORKERS OF AMERICA, DISTRICT 30, UNITED MINE WORKERS OF AMERICA, C. E. BEANE, JOSEPH CASTLE, JOSEPH DAVIS and NOBLE HOBBS,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY TO OPPOSITION BRIEF

FOREWORD[1]

Petitioners believe that answers to statements and arguments advanced in NLRB's opposition brief are to be found in the Certiorari Petition. However, inaccuracies in NLRB's statements, arguments and positions prompt the instant reply by Petitioners, and Petitioners will follow the sequence used in NLRB's Opposition Brief.

UMW's Reply to NLRB's Statement of Questions Presented

Questions Presented by UMW (Pet. 3-4) appropriately set forth the questions involved herein.

[1]The parties and pagination references will be referred to herein as they were in the Certiorari Petition. In addition, NLRB's Opposition Brief is referred to as "Br."

Unless otherwise indicated, all emphases herein are supplied.

UMW's Response to NLRB's Statement

Neither the Special Master's factual narrative (Pet. 4a) nor the evidence (Tr. 376) supports NLRB's recital (Br. 3-4) that "on March 31, 1966 . . . one of the union pickets, who had accompanied petitioner Hobbs to the site, stated that Elkhorn would be organized even if it took bloodshed". The witness (Tr. 376), though claiming 40-50 men sought to have him and others join UMW, charged the bloodshed statement to *"one guy in the crowd"*, and conceding he did not know any of them, later learned that District 30's Newberry "was one of them"; and, as the record shows, Newberry was not held in contempt but *exonerated therefrom* by the Sixth Circuit (Pet. 23-27a).

The rock-throwing incident on April 11 mentioned by NLRB (Br. 4), as the Master's Report shows (Pet. 9-10a), followed *District 30's Beane's request* to "those assembled *to discontinue all picketing*"; and it fails to attribute the alleged act to any of the individual Petitioners or to show it to be the act of an agent of either Union Petitioner.

Similarly, the Master's Report of the truck driver allegedly hit by "a picket, who was holding UMW union membership application cards in his hand" (Pet. 11a), to which NLRB's brief (p. 4) alludes, does not state that any individual Petitioner was present or indicate who the "picket" was; and this information is not supplied by NLRB's reference to the testimony (Tr. 160-61).

The Master's findings (Pet. 14-15a), on which NLRB relies to show the Sixth Circuit properly found Petitioners contemned its decree, included two incidents where company property had been damaged by fire and explosion, but are totally without proof that Petitioners were connected with such acts. Indeed, examination of the

record reference given by NLRB (Tr. 264-76) discloses the witness, asked if he knew who committed the damage, responded, *"No, I don't know anything like that"* (Tr. 270).

Response to NLRB's charge (Br. 4) that Petitioner Castle was one of a group of pickets who threw stones at a Wright Construction Company truck is found in the Certiorari Petition (p. 18). Also, since the Union Petitioners neither actually authorized, nor actually participated in, nor ratified, after actual knowledge thereof, any picketing activities, NLRB erroneously charges "the Union employed mass picketing tactics" (Br. 4-5).

ARGUMENT

UMW's Reply to NLRB's Argument 1.

The Sixth Circuit's appointment of the Special Master and his findings of fact and conclusions of law which the Sixth Circuit approved related to the problem of whether, as NLRB charged, Petitioners had contemned the Sixth Circuit's May, 1960 decree. As Petitioners noted (Pet. 9) the respective parties disagreed on the standard of proof required to find the Petitioners guilty of civil contempt. In the Sixth Circuit, NLRB argued that *Norris-LaGuardia's* Section 6 has absolutely no application to the instant proceeding and that clear and convincing evidence on the record considered as a whole supported the Special Master's findings that Petitioners are in civil contempt of the May 20, 1960 decree. NLRB argues the Master's findings are to be accepted if supported by substantial evidence and are not clearly erroneous (Br. 6); but *U.S.* v. *General Motors Corporation*, 384 U.S. 127, professes the inapplicability of the rule where findings are premised on an erroneous interpretation of the standard to be applied. Such is the instant situation.

UMW's Reply to NLRB's Argument 2.

Since *NLRB* v. *Warren Co.*, 350 U.S. 107, involved an *employer—not a labor union*, it cannot appropriately be regarded as authority for NLRB's contention (Br. 6-8) that the Act's Section 2(13), rather than *Norris-LaGuardia's* Section 6 provides the applicable evidentiary standard in establishing Petitioners' liability in contempt in the instant action. Indeed, Petitioners' argument that a court of appeals' power to deal with contempt derives from its inherent power and not from the Act accords with *Warren Co.'s* avowal that "Congress gave the judicial remedy of contempt as the ultimate sanction to secure compliance with the Board orders" (350 U.S. 112-13). It fortifies Petitioners' argument that the Sixth Circuit's power to enforce the Board's order became *functus officio* under the Act when the Sixth Circuit entered its May 20, 1960 decree.

Even though Congress, in enacting Section 2(13) expressly provided that union responsibility for acts of its union members and officers was to be measured by reference to ordinary doctrines of agency, Congress was careful in limiting the applicability of *Norris-LaGuardia's* Section 6 to restrict such limitation by applying it only to judicial power *"as provided in this section"*; and as Petitioners heretofore pointed out (Pet. 25) the instant contempt proceeding is not one which is "provided in this section". Worthy of repetition is the Second Circuit's admonition that "repeals by implication are not favored", especially where the Norris-LaGuardia Act is not a forgotten one, but is a significant piece of legislation which Congress had specifically in mind when it enacted the Act (*A. H. Bull Steamship Co.* v. *Seafarers' International Union, etc.*, 2 Cir., 250 F. 2d 326, 330, cert. den. 355 U.S. 932).

The legislative history cited by NLRB (Br. 7) is not supportive of its argument that the Act's Section 2(13) is the proper guideline herein. To the contrary, House Conference Report No. 510 on H.R. 3020, as shown in 1 Legislative History of the Labor Management Relations Act, 1947, p. 540 shows that, as originally proposed, Section 12 of the House bill *would have made Norris-LaGuardia inapplicable to conduct of the precise type involved in this proceeding;*[2] Congress rejected Section 12's *broad* limitation; instead it limited *Norris-LaGuardia's* inapplicability to judicial power "as provided in this section".

The inappositeness of *International Ladies' Garment Workers Union* v. *NLRB,* D. C. Cir., 237 F. 2d 545, 551 and *UMWA* v. *Patton,* 4 Cir., 211 F. 2d 742, 748, cited by NLRB (Br. 7), is readily discernible since neither involved a contempt proceeding, both concerned factual situations to which the Act made Section 2(13) applicable, and both fell within the ambit of judicial authority granted courts of appeals by the Act's Section 10(e) or 10(f) or Section 303 (29 USCA 187). Indeed, even where Section 2(13) is applicable, *Garment Workers* condemned a Board decision resting on "simple findings that there was picketing and there was violence" but "No connection between the two" (237 F.2d 552), and *Patton*

[2]Legislative History of the Labor Management Relations Act, 1947 (Government Printing Office), pp. 77-78, reads:

"Sec. 12. (a) The following activities, when affecting commerce, shall be unlawful concerted activities:

"(1) By the use of force or violence or threats thereof, preventing or attempting to prevent any individual from quitting or continuing in the employment of, or from accepting or refusing employment by, any employer; or by the use of force, violence, physical obstruction, or threats thereof, preventing or attempting to prevent any individual from freely going from any place and entering upon an employer's premises, or from freely leaving an employer's premises and going to any other place; or picketing an employer's place of business in numbers or in a manner otherwise than is reasonably required to give notice of the existence of a labor dispute at such place of business; or picketing or besetting the home of any individual in connection with any labor dispute."

(211 F.2d 750) rejected evidence which failed to show a connection between condemned conduct and the union.

While *Madden* v. *Grain Elevator, Flour & Feed Mill Workers, ILA, Local 418*, 7 Cir., 334 F. 2d 1014, rejected a contention similar to that posed herein by Petitioners and this Court denied certiorari (379 U.S. 967), *Polites* v. *U.S.*, 364 U.S. 426, 433, fn. 9, makes clear that denial of certiorari imports no expression of opinion upon the merits of the case. Notably, the Seventh Circuit assigns no reason for its conclusion on *Norris-LaGuardia's* Section 6's inapplicability; the factual situation therein showed that the alleged contemnor was "authorized by its members" to engage in the boycott and persisted therein despite the Court's order. Such is not the instant situation where admittedly Union Petitioners neither participated in, nor actually authorized, nor ratified any conduct violative of the Sixth Circuit's 1960 decree after actual knowledge thereof. The absence of any such *union* activity in NLRB's brief filed herein emphasizes the distinction from *Madden*.

In *Warren Co.*, 350 U.S. 110, NLRB was awarded certiorari where an employer was held not to have contemned a decree enforcing a Board order "Because of the importance of the question in the administration of" the Act. Similar importance exists herein where labor unions seek answer to the quaere if Congress intended by the Act's Section 10 to extend *Norris-LaGuardia's* inapplicability to civil contempt proceedings.[3]

[3]Holdings in *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418, 445-46 and *NLRB* v. *Hopwood Retinning Co.*, 2 Cir., 104 F.2d 302, 305, to the effect that civil contempt proceedings "are a part of the original cause" are not supportive of NLRB's contention that Norris-LaGuardia's Section 6 is inapplicable herein. It is one thing to say that contempt proceedings are part of the original cause; it is an entirely different matter whether Congress rendered inapplicable *Norris-LaGuardia's* Section 6 to the civil contempt charge herein. Likewise, the irrelevancy

(Footnote continued on next page.)

UMW's Reply to NLRB's Argument 3.

The Sixth Circuit rejected Petitioners' argument that activities complained of by NLRB referred to new and independent circumstances not related to conduct which occasioned the Sixth Circuit's 1960 decree, and admittedly involved employers not in business in 1960 and employers not charging parties in proceedings which the 1960 decree enforced. Urging that prior opinions in the Sixth and Second Circuits both upheld and denied the Sixth Circuit's rejection herein, while views in the First and Ninth Circuits were divergent from the Sixth Circuit's action herein, Petitioners invited the award of certiorari to settle the conflict (Pet. 30-35).

NLRB's challenge of Petitioners' assertion of new and independent set of circumstances must be evaluated in light of *admitted* facts (Pet. 31) that of the three charging parties Terry Elkhorn did not start business until *1964*—about four years *after* the Sixth Circuit entered its enforcement decree, that Wright began transporting coal for Terry Elkhorn in 1966, and that while Mahan engaged in coal mining since 1959 and agreed in 1964 to build and operate a tipple for Elkhorn, neither of the three operations was a charging party in the proceedings which led to entry of the enforcement decree in 1960. It is noteworthy that the 1960 enforcement decree was a *consent* decree; and, as stated in *System Federation No. 91* v. *Wright*, 364 U.S. 642, 651, "The consent is to be read as directed toward events *as they then were*."

NLRB's charge (Br. 9) that *Tosh* v. *West Kentucky Coal Co.*, 6 Cir., 252 Fed. 44, is inapplicable must be ap-

---

of *Amal. Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 269, is readily apparent in that it involved the problem of whether a *private party*, as distinguished from NLRB itself, could complain of an employer's failure to comply with a court of appeals' enforcement of a Board order.

praised by the above-noted admitted facts and quotations therefrom found in the certiorari petition (pp. 32-33). But even if both *Tosh* and the First Circuit's *NLRB* v. *Reed & Prince Mfg. Co.*, 196 F. 2d 755, 760, are inapplicable for reasons assigned by NLRB, which Petitioners deny, it is noteworthy that NLRB does not claim that the Sixth Circuit's view in the instant case is *not* in conflict with those in the Ninth Circuit's *NLRB* v. *Pacific Greyhound Lines*, 106 F.2d 867 and the Second Circuit's *NLRB* v. *New York Merchandise Co., Inc.*, 134 F. 2d 949, 953. Petitioners' claim of conflict between the circuits is thus conceded by NLRB. This Court should settle the conflict.

Notably, NLRB concedes (Br. 9, fn. 6), as Petitioners charge (Pet. 7), NLRB could have but did not process the 8(b)(1)(A) charges at the same time it processed 8(b)(7) charges filed by the same employers. In neither *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 194-95, nor *Thompson Products* v. *NLRB*, 6 Cir., 133 F. 2d 637, did a federal agency concern itself with processing one charge and resorting to contempt proceedings in the other, where both charges involved a single set of facts and circumstances. Hence their inappositeness.

UMW's Reply to NLRB's Argument 4.

NLRB does not challenge Petitioners' assertion (Pet. 35-37) that all picketing had ceased prior to NLRB's filing of its contempt petition. Its argument that the contempt remedy "would be substantially impaired if respondents could so easily avoid the impact of a remedial decree" runs counter to doctrinaire expressed in *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418 and reiterated and implemented in other cases cited by Petitioners (Pet. 35-37), and with which the Fifth Circuit's *NLRB* v. *Mooney Aircraft, Inc.*, 61 LRRM 2163, 2164, are definitely

discordant. Neither *NLRB* v. *Mexia Textile Mills*, 339 U.S. 563, 567-68, nor *NLRB* v. *Pool Mfg. Co.*, 339 U.S. 577, 581-82, supports NLRB's position, since neither involved the issue of mootness in a civil *contempt* proceeding and both concerned the Board's right to have a court of appeals accord to it *enforcement of its orders* as Congress mandated in the Act's Section 10. That problem is not in issue herein, the Sixth Circuit having been fully responsive to the Board's enforcement request in its May, 1960 decree.

Contrary to NLRB (Br. 8), the instant case does not present merely an evidentiary issue which does not warrant further review. As already noted (*ante*, p. 3), a vital question pertaining to the findings herein is whether both the Master and the Sixth Circuit applied correct evidentiary *standards*, an issue with which this Court was not concerned in *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275. The irrelevancy of *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-91, is readily apparent when it is considered that fact-finding by one of the tribunals discussed therein involved the *expertise* of the Board—not a Master appointed by the Sixth Circuit.

NLRB's effort (Br. 10, fn. 7) to discredit Petitioners' citation (Pet. 36-37) of *U.S.* v. *UMWA*, D.C. Cir., 190 F. 2d 865, is abortive. A ready answer to NLRB's distinction, namely, "there was no showing that the underlying labor dispute had been resolved" (Br. 10, fn. 7), is that nothing in the Board's order enforced by the 1960 decree required a settlement of the dispute. Indeed, such a requirement would have been in derogation of the right of collective bargaining accorded *employees* (29 USCA 157) of the three complaining employers and would have exceeded NLRB's powers under the Act's Section 10. The lack of requirement in the 1960 decree that there be a settlement

of the dispute is dispositive of NLRB's citations (Br. 11, fn. 7) of *Local 74, Carpenters* v. *NLRB*, 341 U.S. 707, 715 and *Division 1287, Amal. Bus Employees* v. *Missouri*, 374 U.S. 74, 77-78, as inapplicable.

UMW's Reply to NLRB's Argument 5.

No response is found in NLRB's Opposition Brief (p. 11) to Petitioners' contention (Pet. 39) that since civil contempt is wholly remedial the enormous fines placed upon Petitioners, though conditional, if payable to the Court, would be offensive to *Penfield Co.* v. *Securities & Exchange Commission*, 330 U.S. 585, 590-91 and *Gompers*, 221 U.S. 418, 441, holding that "If it is for civil contempt the punishment is remedial, and *for the benefit of the complainant*"; and, since Petitioners were charged with having done that which was prohibited, *Gompers* makes clear that "The only possible remedial relief for such disobedience would have been to impose a fine *for the use of complainant*, measured in some degree by the pecuniary injury caused by the acts of disobedience" (p. 444). Furthermore, the Court will note that NLRB's brief (p. 11) fails to challenge Petitioner's assertion that imposition of such fines is without evidentiary support (Pet. 38).

Nor does NLRB concern itself with answer to Petitioners' charge that *Gompers* rejects the Sixth Circuit's order which provides that future violations will cause the Court to deal therewith by such other means, including issuance of body attachments (Pet. 39), or to Petitioners' charge that inclusion thereof in the Sixth Circuit's order suggests pre-judgment by that court and lack of due process.

Nothing in *Shillitani* v. *U.S.*, 384 U.S. 364, 368-72, cited by NLRB (Br. 11), contravenes in anywise Peti-

tioners' foregoing assertions. Denial by NLRB (Br. 11, fn. 8) that the Sixth Circuit's order unduly expands the scope of the Board's original order overlooks the inclusion in the Sixth Circuit's instant order of the phrases "or of any other employers" and "Violating in any other manner this Court's decree of May 20, 1960" (Pet. 39-40).

CONCLUSION

For reasons assigned in the main Petition and herein, Petitioners, and each of them, pray that the Petition for Writ of Certiorari should be granted and that the Writ issue to review the opinion and judgment of the Sixth Circuit, entered in Case No. 14,226 on April 18, 1968.

Respectfully submitted,

EDWARD L. CAREY
HARRISON COMBS
WILLARD OWENS
900 Fifteenth Street, N.W.
Washington, D. C.

H. B. NOBLE
304 Main Street
Hazard, Kentucky

M. E. BOIARSKY
511 Kanawha Valley Building
Charleston, West Virginia
Attorneys for Petitioners.

Dated: September, 1968